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THE LAW
OF
PERSONAL INJURIES IN
MINES,

**INCLUDING ALL CHARACTER OF PERSONAL INJURIES,
RECEIVED IN AND ABOUT MINES AND QUARRIES,
TREATING OF INJURIES RECEIVED BY EM-
PLOYEES; ACTIONS BY THIRD PERSONS FOR
THEIR NEGLIGENCE AND INJURIES
FROM THE NEGLIGENCE OF IN-
DEPENDENT CONTRACTORS.**

By EDWARD J. WHITE,
Author of
"Mines and Mining Remedies."

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1905.

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TO HON. RICHARD L. GOODE,

**One of the Judges of the St. Louis Court of Appeals,
as a tribute to his distinguished attainments, a recognition
of the obligations of the profession and an evidence of the
author's friendship, these pages are respectfully inscribed.**

PREFACE.

The manner in which the profession received “*Mines and Mining Remedies*,” published in 1903, notwithstanding its many imperfections and the limited scope of the subject treated, prompted the publishers of that work to request a specific treatise upon “*Personal Injuries in Mines*.”

On account of the hazardous nature of the business of mining, a substantial per cent of the numerous decisions in personal injury cases, handed down monthly by the courts of appellate jurisdiction of the different States and Federal Government, are for injuries received in and about mines and quarries.

It is impossible to present, in a single text-book, the substance of “all” these decisions “from the earliest time,” but a persistent effort has been made to outline the doctrines of the leading cases upon the subject, with the principles underlying the decisions.

Lawyers, accustomed to brief complicated questions of law, upon like issues, understand the impossibility, within a limited time, of finding “all” the cases, upon a given subject. The author has endeavored to cite all the leading cases bearing upon the subject, but realizes that he has no doubt fallen short of this aim.

Mr. Buswell’s systematic work on “*Personal Injuries*,” Judge Bailey’s thorough presentation of the subject in his “*Master’s Liability for Injuries to the Servant*” and Mr. Labatt’s exhaustive treatment of the subject in his recent two-volume work on “*Master and Servant*,” have all been freely consulted in the preparation of this work. To these

authors the writer is indebted for many of the underlying principles discussed, and to the publishers of the comprehensive Reporter System, of the different State and Federal courts, the author is indebted for a vast number of decisions cited, to sustain the principles of the text, as well as the text itself.

If any considerable number of the great army of busy practitioners in the United States, engaged in the sturdy struggle for the enforcement of the rights of citizens, and a few of the more authoritative members of the profession, whose province it is to decide in these conflicts, shall find any assistance from this work, in the performance of their exalted duties, the author will be satisfied with his undertaking.

E. J. W.

Aurora, Mo.,
September, 1905.

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PERSONAL INJURIES IN MINES

CHAPTER I.

THE SUBJECT GENERALLY.

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§ 1. **Scope of the work.** — Many general text-books have been published upon the civil liability, resulting from negligent acts, inflicting personal injuries. Lawyers, generally, are familiar with the standard works pertaining to such liability, some of which are limited to some of the peculiar relations of the parties interested. No treatise has heretofore appeared, devoted entirely to personal injuries received in any particular vocation of life. The object of this work is to treat specifically of personal injuries, from negligence, and injuries charged to have been due to negligence, received in and about mines and mining property only.

§ 2. **Basis of the action.** — The two things that must always exist to constitute a cause of action for personal injuries are a wrongful act by the defendant and a resulting injury to the plaintiff. From these concurrent elements the resultant damage, in the eye of the law, flows, as a necessary concomitant and compensation from the one

causing the injury, to the injured member of society, is exacted, as a matter of simple justice. The breach of some duty that the defendant owes the plaintiff is the measure of the defendant's accountability.¹

§ 3. What constitutes actionable negligence. — It is not always an easy matter to determine just what acts or omissions will, or will not, furnish a cause of action to one injured as a result thereof. Always relative to the circumstances of each particular case and variable, likewise, by the facts connected therewith, actionable negligence is a difficult term to define. The test, by which to judge whether a given act is, or is not negligence, is what a "reasonable man" under the circumstances would or would not do.² The negligent act may be either one of omission or commission and where there is also a correlative duty owed to the injured party, the negligent act, causing the injury, would sustain an action therefor.³

§ 4. Same — Injuries from natural agencies. — Where an injury results from a natural cause, beyond the control of man, there is no responsibility on the part of the owner of the property where the injury was received, even though

¹ Buswell Law Per. Inj., § 3, p. 3; Watson Dam. Per. Inj. 2; *Armour v. Galkewska*, 95 Ill. App. 492. There can be no negligence, without a breach of legal duty due the injured one. *Kennedy v. Chase*, 119 Cal. 637.

² This "reasonable man" of the negligence case reports, frequently makes his appearance under as varied circumstances and with as many different characteristics as Eugene Field's many sided "John Smith." Being a creature of the imagination his acts are as dissimilar as the dispositions and views of various judges throughout the country and this is why we find so many inconsistent holdings as to what constitutes negligence in different sections of the country.

³ Negligence was recently defined as "the failure to observe, for the protection of another's interest, and safety, such care, prudence and vigilance, as the circumstances justly demand and the want of which causes the injury." *Downey v. Gemini Mining Co.* (Utah, 1902), 68 Pac. Rep. 414; *Richardson v. Kier*, 4 M. M. R. 613.

his acts may have conduced to produce the injury, if his conduct could not be characterized as negligent.¹ But to exempt a property owner on this ground, the direct cause of the injury must have been some natural force, with a knowledge of which all men are equally chargeable.² And if the mine owner, or operator, had himself been guilty of some act or omission, but for which the injury would not have resulted, from the natural causes alone, then negligence might, in such case, be imputed to the author of the injury, notwithstanding the presence of natural forces contributing thereto.³ An illustration of this rule would be an injury from falling rock or dirt, precipitated upon the plaintiff, without defendant's fault, on account of a removal of the superincumbent stratum, by which it was subjected to the law of gravitation. In such case, the plaintiff could not recover.⁴ On the other hand, if a knowledge of the unsupported roof or wall could be brought home to the defendant and the necessity of proper support therefor, then his negligence in failing to properly retain the same would furnish a cause of action to the one injured as a result thereof, and the mere fact that a natural force combined to occasion the fall of the object resulting in the injury, would not relieve the defendant of liability.⁵

¹ *Fletcher v. Smith*, 5 Mor. Min. Rep. 78; *Olson v. McMullen*, 24 N. W. Rep. 318.

² *Olson v. McMullen*, 24 N. W. Rep. 318; *Bradley v. Ry. Co.*, 138 Mo. 293.

³ *Robinson v. Black Diamond Co.*, 14 Mor. Min. Rep. 93.

⁴ *Olson v. McMullen*, 84 Minn. 94; *Rasmussen v. C., R. I. & P. Co.*, 65 Iowa, 236; *Finlayson v. Utica M. & M. Co.*, 67 Fed. Rep. 507; *Curley v. Huff*, 5 Am. Neg. Rep. 668.

⁵ *Hammon v. Coal Co.*, 156 Mo. 234; *Smith v. Coal Co.*, 75 Mo. App. 177; *Himrod & Co. Coal Co. v. Clark*, 99 Ill. App. 332; 197 Ill. 514; *Wahlquist v. Coal Co. (Iowa)*, 89 N. W. Rep. 98. A servant held to have known that, if he got underneath an overhanging rock and struck it with a sledge hammer, portions of it would necessarily fall. *Hightower v. Gray (Tex.)*, 83 S. W. Rep. 254.

§ 5. **Must be breach of duty by defendant.** — To sustain a cause of action the plaintiff must have suffered not only a damage, but the infraction of some right, upon which to predicate the liability of the defendant, for if there were no violation of the plaintiff's rights, or the breach of no duty toward him by the defendant, however great the injury received, there would be no civil liability therefor, on the part of the defendant.¹ In such case, the rule *damnum absque injuria* would be applicable.²

§ 6. **Defendant's negligence alone insufficient.** — The mere negligence of the defendant, unless there was a duty violated toward the plaintiff, in such act of negligence, would not furnish a cause of action, although an injury might result from the negligent act.³ The law requires that one shall so regulate his person and property as not to injure others, in the enjoyment of their legal rights, but it also recognizes the right of every property owner to use his property in a lawful way, and while exercising his rights in this regard, if a mine owner unintentionally causes damage to another, no action could be predicated upon such lawful act.⁴

§ 7. **Liability, irrespective of negligence.** — In an early New York case, it was held that a party injured by a rock thrown by blasting on adjoining premises, could main-

¹ Watson Dam. Per. Inj., Sec. 2, p. 2; Buswell Law Per. Inj., Sec. 3, p. 3; Black's Law & Prac. Acc. Cas., Sec. 17, p. 14; Whart. on Neg., Sec. 24; Shear. & Red. Neg. (5 Ed.), Sec. 3.

² Spade v. Lynn, 168 Mass. 285; Brewer v. Collins, 53 N. H. 442; Belese v. Trenton Co., 23 Va. 250; Kennedy v. Chase, 119 Cal. 637. The degree of care, due from a master to his servant, does not vary with the increase or diminution of the danger, but the quantum of diligence to be used does differ, under different conditions. Galveston H. & S. A. Co. v. Gormley, 91 Texas, 393; 43 S. W. Rep. 877.

³ Watson Dam. Per. Inj., § 3, p. 2.

⁴ Ante, *idem*, Sec. 4, p. 3.

tain an action, irrespective of the question of negligence, on the theory that the act of blasting in such proximity to the plaintiff's property, was, of itself, such an invasion of the plaintiff's rights, as to furnish the plaintiff a remedy for his injuries. The reasoning of the court, however, in this case, regardless of the correctness of the result of such reasoning, is erroneous, for while deciding the cause upon other grounds, the very basis of the court's judgment is the negligence of the defendant.¹

§ 8. Violated right and injury essential. — Negligence alone, without a violation of some duty owing to the plaintiff, coupled with an injury, will not afford a basis of recovery, but in all cases there must be combined both the breach of duty owing to the plaintiff and the injury resulting from the breach of such duty. This result follows, necessarily, from the very nature of the action for personal injuries, for whether the plaintiff declares in tort or upon a contract, a breach of duty must be shown and the resulting injury, as the measure of the defendant's liability.² Without establishing both a breach of duty toward himself, and a resulting injury, the plaintiff in a personal injury action would show no more right to a recovery than could a perfect stranger to a violated contract, who was not damaged by the breach of such contract. The breach of duty, being the initial fact, upon which a liability depends, with a view of ascertaining when such breach occurs, it therefore becomes important to consider the parties toward whom such duties are owing.

¹ *St. Peter v. Dennison*, 58 N. Y. 416.

² *Buswell Per Inj.*, Sec. 8.

CHAPTER II.

PARTIES TO ACTION.

- SECTION 9.** Who entitled to sue generally.
10. When authorized by statute.
 11. Domestic and foreign statutory actions for death.
 12. Parent and child.
 13. Same — Under mining statutes.
 14. Child's right of recovery for death of parent.
 15. Infants and lunatics.
 16. Statutes preventing employment of infants.
 17. Same — How suits for are prosecuted.
 18. Husband and wife — Action by widow.
 19. Same — Statutory right of action by wife divorced.
 20. Master and servant.
 21. Independent contractor.
 22. Lessor and lessee.
 23. Same — Lessee's liability.
 24. Defendants jointly and severally liable.

§ 9. Who entitled to sue generally. — As a general rule, any one toward whom there has been a breach of duty by reason of a negligent act resulting in an injury, can maintain an action therefor against the party whose negligence caused the injury.¹ Wherever the act causing the injury would constitute a violation of duty owed the injured party, then a recovery for the injury could be had and there is no difference where the injury is in violation of some duty due the injured one, whether it be a stranger or an employee who is injured.² But if the injured party could not show a violation of some duty owed him in the commission of the act causing the injury, then there would

¹ For distinction between contract and public duty as the basis of action, see Buswell Per. Inj., Secs. 5, 6, pp. 4, 7.

² *Ante, idem*, Secs. 83 to 86.

be no liability therefor and, hence, a mere trespasser, or licensee, cannot, generally, maintain an action.¹

§ 10. **When authorized by statute.**—All statutes creating a right of action for injuries resulting in the death of the party injured are construed strictly by the courts, as all such acts are in contravention of the common law rule that actions for personal injuries did not survive the death of the person injured.² The right of action, for injuries resulting in death, is limited to those persons expressly named in the statute creating the right and no one could sue for damages resulting from the death of a person injured through the negligence of a mine owner, except those empowered by the statute.³

§ 11. **Domestic and foreign statutory actions for death.**—Since 1846 in England and the United States statutes have been passed, giving a right of action for injuries resulting in death, against the party wrongfully causing such injury.⁴ Since, at common law, such actions died with the injured one, only those named in the statute where the injury occurred are capable of suing. The right of action is usually given to the “husband or wife.”⁵

¹ They assume ordinary risks. Buswell Per. Inj., Sec. 71.

² *Baker v. Bolten*, 1 Camp. 498; Buswell Per. Inj., Sec. 15 to 18 and cases cited; *Parsons v. Mo. Pac. Co.*, 94 Mo. 286; *James v. Christle*, 18 Mo. 162.

³ Personal representatives would not be included as within the terms of an act unless expressly referred to as entitled to its provisions. *McIntosh v. M. K. & T. Co.*, 103 Mo. 340; *Boyd v. Brazill Block Coal Co.*, 22 Ind. App. 329; 50 N. E. Rep. 868; *Maule Coal Co. v. Partenheimer*, 55 N. E. Rep. 751.

⁴ The English statute from which all such acts are taken is what is generally known as “Lord Campbell’s Act,” 9 & 10 Vict. ch. 93. The statutes in different States in America, are familiar to lawyers of each State.

⁵ R. S. Mo. 1889, § 4425.

“parent and child,”¹ “executors or administrators,”² “personal representatives,”³ “beneficiaries,”⁴ or “those dependent for support,”⁵ and those which fall within the class named in the statute alone are allowed to sue. Where the action is brought in one State for death in another the parties entitled to sue depends upon the statute where the death occurred and not where the suit is instituted.⁶ And the defendants, in actions for death by wrongful act, also depend entirely upon the statute creating the liability, and whether the liability is imposed under a domestic or a foreign statute, its provisions, as to parties plaintiff and defendant, must be followed.⁷

§ 12. **Parent and child.** — The law entitles a parent to the services of a child only during minority and since the basis of the action for injuries to children, by parents, is the loss of services, the parent is entitled to compensation for the services of the child only during minority, for, when emancipated, the proceeds of services belong to the child.⁸ And as the parent is entitled to the damages for

¹ R. S. Mo., 1899, § 8820.

² Lord Campbell's Act, *supra*.

³ 23 U. S. St., p. 807.

⁴ Ga. Laws, '87, p. 43.

⁵ R. S. Mo. 1899, Sec. 8820.

⁶ *Usher v. West Jersey Co.*, 126 Pa. St. 206; *Lawer v. Segal*, 80 Vt. 66. In an action for personal injuries the law of the place where the injuries occurred governs. *Johnson v. Union Pac. Coal Co.* (Utah, 1904), 76 Pac. Rep. 1089.

⁷ Black's Law and Prac. Acc. Cas., Secs. 146, 147 and cases cited. “A right of action in Missouri for a negligent injury inflicted in Iowa is governed by the law of Iowa.” *Williams v. Chicago, R. I. & P. Co.* (Mo. App. 1904), 79 S. W. Rep. 1167.

⁸ “To submit to a jury the value of a life, without limit, as to years, would be to leave them to speculate upon its duration, without any basis of calculation. The law entitles the mother to the services of her child during his minority only; beyond this, the chances of survivorship, his ability or willingness to support her, are matters too vague to enter into

loss of service by the child, during minority, the child cannot recover for such loss of wages, preceding its majority,¹ but its action is for impairment of earning capacity after emancipation and for the physical injuries received, for which the child can maintain a separate action against the one causing the injury.² No action by either the parent or child, will bar a suit by the other, on his own account, for injury to the child, for while the latter can recover for his own physical injuries and the attendant pain and suffering, and the consequent impairment of his earning capacity,³ the former can only recover for the loss of services, so long as entitled thereto,⁴ and neither action, being for the same damages or between the same parties, would bar the other. Wages in the past, due a minor, is not an element of damage, in a suit by him, for the reason that the parent is entitled to such wages,⁵ but if the suit is by such parent, as guardian for the minor this is held, in some cases, to be a waiver by the parent of the wages sued for and the minor can then recover for lost wages.⁶ Likewise, the minor may recover for pain and suffering, incident to the injury, but this is not an element of damage, on the part of the

an estimate of damages merely compensatory." *State v. B. & O. R. R. Co.*, 24 Md. 84; *Parsons v. Mo. Pac. Co.*, 94 Mo., p. 295; *Bernard v. Merrill*, 91 Me. 858; 80 Atl. Rep. 156; *Bridger v. Ashville Co.*, 27 S. C. 456; 8 S. E. Rep. 860; 18 Am. St. Rep. 656.

¹ *West. Union Co. v. Woods*, 88 Ill. App. 375; *Stewart v. Rippon*, 88 Wis. 584.

² *Baker v. Flint and C. Co.*, 91 Mich. 298; 51 N. W. Rep. 897; 16 L. R. A. 154.

³ *Peppercorn v. Black River Falls*, 89 Wis. 38; 61 N. W. Rep. 79.

⁴ *East Tenn. Co. v. Hughes*, 17 S. E. Rep. 949; *Drew v. 6th Avenue Co.*, 26 N. Y. 49; *M. K. & T. Co. v. Rodgers*, 89 S. W. Rep. 883.

⁵ *Abeles v. Bransfield*, 18 Kan. 16; *A. & W. R. Co. v. Smith*, 20 S. E. Rep. 763.

⁶ *Chesapeake &c. Co. v. Davis*, 22 Ky. L. R. 748; 58 S. W. Rep. 698; *Corsicana Oil Co. v. Valley*, 14 Tex. Civ. App. 250; 86 S. W. Rep. 999.

parent, suing for injuries to his child.¹ The parent is entitled, however, to recover all expenses and outlay, attendant upon the injuries to his child, except nurse hire to the members of his own family,² and, in some States, even such elements may be considered.³ But if the injury to the child is the result of the parent's negligence this will defeat his right of action for loss of services,⁴ and where the only right to sue depends upon a statute, giving a cause of action to employees, the parent of a minor employee cannot sue.⁵ A parent is not generally liable for the negligent acts of an infant child, resulting in injury to another, but such infant is himself liable for his own torts,⁶ and a parent would only be liable where the tort was committed in his presence or under his authority.⁷

§ 13. Same — Under mining statutes — Loss of Support. — Under many statutes, giving an action to the

¹ *McMillan v. U. P. Co.*, 6 Mo. App. 484; *Pa. Co. v. Kelly*, 81 Pa. St. 372.

² *Woeckner v. Erie Motor Co.*, 187 Pa. St. 206; 8 Am. Neg. Rep. 601; *Goodhart v. Pa. Co.*, 177 Pa. St. 10; 35 Atl. Rep. 192.

³ *Co. Com. v. Hamilton*, 60 Md. 340; *Morgen v. Pac. Mills*, 158 Mass. 402; 33 N. E. Rep. 581; *Schmitz v. St. L., I. M. & S. Co.*, 46 Mo. App. 380.

⁴ *Hooper v. Southern Co.*, 112 Ga. 96; 37 S. E. Rep. 165.

⁵ *Woodward Iron Co. v. Cook*, 124 Ala. 349; 27 So. Rep. 455.

⁶ *Baker v. Holdeinan*, 24 Mo. 219; *Hagerdy v. Powers*, 66 Cal. 368; *Harris v. Cameron*, 81 Wis. 239.

⁷ *Black's Law & Prac. Acc. Cas.*, Sec. 40, p. 43. But see *Code of Georgia* (1895), Sec. 3817, making parent liable for the tort of his infant child. And see also *Johnson v. Gladden*, 5 Amer. Neg. Rep. 97. "In an action for an injury to a coal miner, it appeared that he and his father worked jointly for the defendant company; that the ticket put on their car was 'M. & Son,' and that the father collected the pay of both, to which he was entitled on account of the son's minority. *Held*, that an instruction that if the father used the son as an assistant, and received the earnings from their joint work, the latter was a mere licensee, was properly refused." *Chicago, W. & V. Coal Co. v. Moran* (Ill. 1904), 71 N. E. Rep. 88; 210 Ill. 9.

parent for death of a child, the action accrues only to the father or mother of a minor child.¹ In some other statutes the right accrues to the parent, regardless of the minority of the child² and, frequently, in case of loss of life, the action is given to those dependent for support.³ For instance, in Missouri, the mining statute gives a right of action, in case of death, to widow, lineal heirs or adopted children, or “to any person or persons, who were before such loss of life, dependent for support” upon the person killed. Both upon principle and authority, it would seem that this act, by the enumeration of certain legally dependent persons, intended to limit the right of action to those legally dependent for support, which would exclude the right of a parent of an adult child. After its majority the child may, voluntarily, contribute to his parent’s support, as he may to any other relative or friend, who might, in reality, be dependent for support upon his generosity, but, in strict legal aspect, the child would be under no legal obligation to support his parent after attaining his majority, as his services are his own and he can donate them or utilize them as he sees fit. Hence, it seems, in holding that a right accrues to the parent of an adult child, under such statutes, the courts are going a long way toward the realm of speculation, to predicate a damage suit upon the letter of such acts, where a jury can, “without limit, as to years, speculate upon the duration of a life, without any basis of calculation.” Not only this, but the continuance of the child to render such support, his survivorship and such other contingencies, upon which his continued support, depends, renders it a mere chance, upon which to base

¹ This is true of the General Damage Act in Missouri. R. S. Mo. 1899, Sec. 2864.

² This is the New York statute.

³ R. S. Missouri, 1899, Sec. 8820.

a verdict.¹ However, under the Missouri statute above quoted, the court holds that the parent of an adult child is entitled to sue, if dependent for support,² in such cases as fall within the "prop statute" and similar holdings are also extant in other states.³

§ 14. **Child's right of recovery for death of parent.** — Most of the statutes giving a right of action for death by negligence, create the right on the part of widow, children and parents of the deceased,⁴ and hence, under most of the acts, the child or children of one killed through negligence, has a cause for action for such death, against the wrong-doer.⁵ In actions by children, under such statutes, damages are not, usually, confined to any exact mathematical calculation,⁶ as the loss of a parent's care, in

¹ *Parsons v. Mo. Pac. Co.*, 94 Mo., p. 295; *State v. B. & O. Co.*, 24 Md. 84; *Good v. Towns*, 56 Vt. 410; 48 Am. Rep. 799; 8 Am. & Eng. Enc. Law (2 ed.), 903 and cases cited; *Hodnett v. R. R.*, 156 Mass. 86; *Tel. Co. v. McGill*, 57 Fed. Rep. 699; *Duval v. Hunt*, 84 Fla. 85; 15 So. Rep. 76.

² *Bowerman v. Lackawanna Mining Co.*, 98 Mo. App. 308. See *contra*. *Buswell Per. Inj.*, Sec. 12, p. 15.

³ *Daley v. Steel & Iron Co.*, 155 Mass. 1; *Hodnett v. R. R.*, 156 Mass. 86; *Daniels v. R. R.*, 86 Ga. 236; *Railway v. Sweet*, 45 Ill. 197. These cases, which recognize such a right, on the part of a parent of an adult child, base it solely upon the *fact of dependency*, without reference to the realm of speculation, which such a construction actually enters. *Bowerman v. Lackawanna Co.*, *supra*. Where the primary right to sue for the death of the person killed is in the wife, the parent cannot maintain an action without both pleading and proving that deceased was unmarried, *McIntosh v. Mo. Pac. Co.*, 103 Mo. 131; *Barker v. Ry. Co.*, 91 Mo. 86.

⁴ Lord Campbell's Act, 9 and 10 Vict. Ch. 93, Secs. 1 and 2; N. Y. Code Civ. Proc., Sec. 1903; R. S. Mo. 1899, 2866; S. R. Ind., Secs. 7083, 7085; S. R. 1897, 5206t; Acts Ind. 1891, p. 57; Burnes' Rev. St. 1894, Sec. 7461, for death in Coal Mines; Code Iowa, 1897, Secs. 8443 to 8447; McLain's Ann. Code, 1888, Sec. 3730; Dassel's Gen. St. Kan. 1899, p. 948; Stat. Ok. 1893, p. 832; Hill's Ann. Laws, Oregon, p. 158; Pub. Gen. St. N. H. 1901, p. 712.

⁵ 2 Joyce, Dam., Sec. 849 *et sub*; Shear. & Redf. Neg. (3 ed.), Sec. 618.

⁶ *Stoher v. St. L., I. M. & S. Co.*, 91 Mo. 518.

the education and maintenance and support of children, has an appreciable pecuniary value, in addition to the moral element of damage resulting from such loss.¹ Accordingly juries are not, usually, limited to merely nominal damages, in actions by children for the death of parents, although no showing of earning capacity is made, but juries are allowed some discretion in the assessment of such damages, with which the courts will not interfere, unless there is a clear abuse of their prerogatives.² Where the right of action is recognized by the statute, as primarily in the widow, the child cannot sue, if there is a widow, without a renunciation of the right, on her part, or unless she dies, during the period of her right to maintain an action;³ and if the deceased leaves both a widow and child surviving, if the law gives the widow the whole period of the life of the action, in which to sue, as under the mining statute in Missouri, no action could be maintained by a child, until the death of the widow, within the period limited for bringing the suit,⁴ and the right to sue is generally limited to minor children only, as an adult child has no pecuniary right to the society or care of the parent.⁵

§ 15. **Infants and lunatics.** — Parties under disability, such as infants and lunatics, who would not be liable, on account of such disability, upon a contractual obligation, are nevertheless liable for their torts and can be sued in damage for negligence resulting in personal injury to any one toward whom they owe a duty, the same as though they

¹ *Tilley v. Hudson River Co.*, 29 N. Y. 252; 37 N. Y. 287.

² *Shear. & Redf. Neg.* (3 ed.), Sec. 613; *Stoher v. St. L., I. M. & S. Co.*, 91 Mo. 518, 519.

³ See R. S. Mo. 1899, Sec. 8820; *Poor v. Watson*, 92 Mo. App. 89.

⁴ *Poor v. Watson*, 92 Mo. App. 89.

⁵ *B. & P. R. Co. v. Golway*, 23 Wash. L. R. 308; 2 *Joyce Dam.* 889.

were not under disability to make contracts.¹ It has been intimated in one case that the courts would be more prone to regard an injury by a party under legal disability in the light of an accident, than a negligent act,² but this is not in accordance with the weight of authority, and, if generally followed, would release persons under disability from all responsibility for their negligent acts.³ Hence an infant, *sui juris*, is held liable for the result of his negligent acts, the same as an adult,⁴ and if another is injured, as a result of his wrongful act, or if his own wrong occasioned an injury to an infant or lunatic, such negligent act could be set up as a defense to an action by him for the injury and the plea of contributory negligence on his part would prevent his recovery the same as it would that of an adult, under similar circumstances.⁵

§ 16. **Statutes preventing employment of infants.** — Statutes have been passed in many of the mining States preventing the employment of infants of tender years in the underground work of mines.⁶ Where an injury to a child under lawful age employed in violation of the statute would not have occurred, but for such illegal employment, this, of itself, is sufficient evidence of negligence to render the employer liable in damages, for such injury.⁷

¹ Black's Law & Prac. in Acc. Cas., p. 43, Sec. 39; *Moran v. Devlin*, 134 Mass. 87; 1 Ch. Pl. 66.

² *Bullock v. Babcock*, 3 Wend. 391.

³ Black's Law & Prac. Acc. Cas., Sec. 39, p. 43.

⁴ 1 Ch. Pl. 66; *Moran v. Devlin*, 132 Mass. 87; Black's Law & Prac. Acc. Cas., Sec. 39, p. 43.

⁵ *Carter v. Baldwin* (Mo. 1904), 81 S. W. Rep. 204; *Williams v. Hays*, 143 N. Y. 442.

⁶ Mining Act, Ill., Sec. 22; Burn's Ann. St. Ind. 1901; N. Y. Laws 1902, c. 600. See Black's Law & Pr. Acc. Cas., Secs. 118 and 119.

⁷ *Morino v. Lehmaier*, 173 N. Y. 530; 66 N. E. Rep. 572; *Marquette Third Vein Co. v. Dielle*, 110 Ill. App. 684. "The owner of a mine, who employs a child in such mine contrary to Mining Act, § 22, is liable for any injury which occurs in its mine, and by the operation of the mine, to the child." *Marquette Third Vein Coal Co. v. Dielle*, 110 Ill. App. 684.

§ 17. **Same — How suits for are prosecuted.** — In most of the United States, by statute, an infant is permitted to prosecute actions for injuries to his person, either by his general guardian, in case one has been previously appointed, or by a guardian *ad litem*, or next friend, appointed for the purpose by the court where the action is filed.¹ The right of action is generally first given to the parents for the death or injury to a minor child.² The father is usually given the primary right of action and in case of his death, the mother,³ but as the right of action for injuries to, or death of a minor child, is of purely statutory origin, a compliance with the statute is necessary to be shown in such an action, both as to parties and general procedure.⁴

§ 18. **Husband and wife — Action by widow.** — For injury to the wife the husband is entitled to recover for the loss of her services,⁵ but not for her physical pain and suffering, as this is an element of damage to be recovered by the wife alone.⁶ No particular evidence is essential of

¹ Ala. Code, 1886, Sec. 2579; R. S. Ariz. 1887, Sec. 1342; Dig. St. Ark. 1894, Sec. 5645; Deer. Ann. Code Cal. 1885, Sec. 372; Rev. Code Del. 1893, Sec. 29; R. S. Ala. 1892, Sec. 982; Gen. St. Kan. 1889, Sec. 4108; St. Minn. 1894, Sec. 5160; R. S. Mo. 1889, Sec. 1997; Gen. St. Nev. 1885, Sec. 3081; Laws N. M. 1884, Sec. 2335, R. S. Ohio, 1894; Sec. 4998; Hill's Ann. Law, Oregon 1892, Sec. 32; Brightley's Purdy's Dig. Pa. 1894, Sec. 1629; R. S. So. Car. 1893, Sec. 163; Code Tenn. 1885, 4874; Laws Utah, 1888, Sec. 3174; Hills Ann. Code, Wash. 1891, Sec. 142; Code W. Va. 1891, Sec. 14, p. 675; R. S. Wyo. 1887, Sec. 2387.

² Consult above statutes.

³ *Rue v. Myers*, 16 Stew. (N. J.) 377; *Hedges v. Frazier*, 31 Ark. 58; *Parsons v. Mo. Pac.*, 94 Mo. 288; *McCorrick v. Kealy*, 70 Conn. 542; *Ring v. Iron Works*, 120 N. J. 433.

⁴ *Black's Law & Prac. Acc. Cas.*, Sec. 119.

⁵ *Redfield v. Oakland Co.*, 112 Cal. 220; 43 Pac. Rep. 1117; *Cullar v. M. K. & T. Co.*, 84 Mo. App. 347; *Riley v. Lidtke*, 49 Neb. 139; 68 N. W. Rep. 856.

⁶ *Howells v. N. A. Co.*, 24 Wash. 689; 64 Pac. Rep. 786; *Cullar v. M. K. & T. Co.*, 84 Mo. App. 347.

the value of her services,¹ but such domestic care as a wife usually exercises in the home, is the basis of the recovery.² The husband's right to such services is not effected by the married women acts;³ he is entitled to recover for all expenses incurred in and about her injuries⁴ and no deduction is made for the necessary maintenance, of the wife, from the amount allowed for the loss of her services.⁵ In most of the States the wife is entitled to recover for the death of her husband, by negligence and, generally, the primary right to sue is vested in her, on account of her legal dependency and close relationship to the deceased. The amount and measure of damages allowed in the different States are so different that the statutes cannot be well classified, but the leading provisions will be found in the note.⁶ In some States the right to sue for death by neg-

¹ *Kelly v. Mayberry T.*, 154 Pa. St. 440; 26 Atl. Rep. 595.

² *Selleck v. Janesville*, 100 Wis. 157; 80 N. W. Rep. 944; *Redfield v. Oakland Con. Co.*, 112 Cal. 220; 44 Pac. Rep. 1117; *Furnish v. M. P. Co.*, 102 Mo. 119.

³ *Cullar v. M. K. & T. Co.*, 84 Mo. App. 347.

⁴ *U. P. Co. v. Jones*, 21 Colo. 340; 40 Pac. Rep. 891; *Northern Cent. Co. v. Mills*, 61 Md. 355.

⁵ *San Antonio Co. v. Belt*, 59 S. W. Rep. 607.

⁶ Age, mental and physical health, life expectancy, occupation, earning capacity, experience, character and all the circumstances tending to show the pecuniary loss are held competent, where this is the basis of recovery. 23 U. S. St. at L. 307, ch. 126; *B. & O. Co. v. Mackey*, 157 U. S. 72; 39 L. Ed. 624. Much depends, however, upon the nature of the statute and whether it is compensatory remedial or penal. See, R. S. Mo. 1899, 8820; *Burn's Rev. Stat. Ind.* 7473; *Dassler's Gen. St. Kan.* 1899, p. 943; *Laws, Minn.* 1887, ch. 13; *St. Ok.* 1898, p. 832; *Pub. St. N. H.* 1901, p. 712; *Hill's Ann. Laws, Oregon*, p. 158; 2 *Ga. Code*, 1895, Secs. 3825 to 3866; *Ky. Carroll's St.* 1899, p. 179; *Dak. Comp. Laws*, Secs. 5498 *et sub.*; *Mass. Stat.*, 87, ch. 270; *Miss. Code*, 1892, Sec. 3559; *Nev. Comp. Laws*, 1900, 3983; *Ohio, Bates, Ann. St.* 6134, *et sub.*; *Tenn. Shannon's Ann. Code*, 1896, p. 986, *et sub.* The basis of recovery is dependent upon different statutes in different States and the amounts range from \$5,000.00 upward. For general elements of damages, in different States, see 2 *Joyce, Dam. Secs.* 859 to 869.

ligence is in the widow, but her right is limited in time, and where such provisions appear, she loses her right to sue, unless she does so, within the time limited.¹ The statutes, generally, are based upon the pecuniary loss sustained by the widow and the damages are allowed by way of compensation for the pecuniary loss of the decedent's earnings, support and society.² Different elements of damage and various rules for the establishment of such damages are recognized in the several States and no reliable general rule can be laid down, but must depend upon the legislative acts of the jurisdiction where the death occurred.

§ 19. Same — Statutory right of action by wife divorced. — The common law rule with reference to suits for personal injuries to married women has been superseded in most of the United States by code provisions, creating a right on the part of a married woman to sue in her own name for injuries to her person.³ And where the husband and wife are divorced, the wife can sue for personal injuries to herself, the same as though she were a *feme sole*

¹ In the different States, where the statutes are cited above, the time limit is as follows: One year in the following States: Missouri, District of Columbia, Mississippi, and two years in Ohio, New Hampshire, Rhode Island and Washington.

² *L. E. & St. L. Co. v. Clark*, 152 U. S. 220; 38 L. Ed. 422; *A. T. & S. F. Co. v. Ryan*, 62 Kan. 682; 64 Pac. Rep. 603; *L. & N. Co. v. Graham*, 98 Ky. 688; 34 S. W. Rep. 229; *Kleps v. Donald*, 4 Wash. 486; 30 Pac. Rep. 991; *St. L. Co. v. Freeman*, 86 Ark. 41; 2 Joyce Dam., Sec. 854 and cases cited.

³ Stat. Ark. 1894, Sec. 5641; Code Civ. Proc. Colo., Sec. 6; Rev. Code Del. 1893, p. 600; Rev. Code Iowa, 1888, Sec. 2562; Gen. St. Kan., Sec. 4106; Stat. Kv. 1894, Sec. 2128; Minn. St. 1894, Sec. 5159; Miss. Code 1892, Sec. 2289; R. S. N. Y. 1890, Sec. 2153, p. 464; R. S. Ohio, 1894, Sec. 4996; Laws Oregon, 1892, Sec. 30; B. P. Dig. Pa., 1894, Sec. 52; Hill's St. Wash. 1891, Sec. 187; Code W. Va. 1891, Sec. 15, p. 628; R. S. Wyo. 1887, Sec. 2345.

and this, whether the injuries occurred before or after the decree of divorce.¹

§ 20. **Master and Servant.**—The principle is well settled that where a servant is employed to perform or superintend work, the master is responsible to third parties for injuries resulting from the neglect of the servant in the performance of his work.² And this principle obtains, although the servant exceeds his powers or disobeys his instructions in the performance of the negligent act, provided he does the act in the course of his employment.³ And in a case of positive misfeasance and not mere omission of duty, on the part of the servant, he is individually liable to a third party for injuries resulting therefrom.⁴ For instance, in one case, an employee was ordered to build a trap-door and did the work so negligently as to cause the injury to the plaintiff and it was held that the injured party could recover not only from the master, but that the ser-

¹ *Peru v. French*, 55 Ill. 317.

² *Dolan v. Hubinger*, 109 Iowa, 408; 80 N. W. Rep. 514; *Pioneer F. C. Co. v. Sunderland*, 87 Ill. App. 213; *aff'd* 58 N. E. Rep. 928.

³ *F. L. I. Co. v. People*, 103 Ill. App. 554; *aff'd* 66 N. E. Rep. 379; *Steele v. May*, 135 Ala. 483; 33 So. Rep. 80; *Clombis v. Tuesno*, N. & I. Co.; 118 Cal. 315; 6 Am. Neg. Rep. 326.

⁴ The distinction in the text between mere omissions of duty and positive wrongs, is warranted by the cases. In *Wright v. Wilcox* (19 Wend. 343), Cowen, J., says: "In a case of strict negligence by a servant, while employed in the service of his master, I see no reason why an action will not lie against them both. They are both guilty of the same negligence, at the same time and under the same circumstances; the servant in fact and the master, constructively, by the servant, his agent." And Lord Holt, in his celebrated judgment in *Lane v. Colton* (12 Mod. 488; *s. c.* *Ld. Raymond*, 646, 655), says that for the neglect of the servant third persons can have no remedy against him, but that the master is alone chargeable; but for a misfeasance, or actual tort, an action will lie against the servant, because he is the wrong-doer. See also *Monfort v. Hughes*, 3 E. D. Sm. 591; *Snydan v. Moore*, 8 Barb. 358; *Phelps v. Wait*, 80 N. Y. 78. But being joint tortfeasors, they can be sued jointly or severally. *Raney v. La Chance*, 96 Mo. App. 479; 70 S. W. Rep. 376.

vant was also liable for the injury.¹ Again, both have been held liable for an injury from blasting in a quarry, the servant as the actual wrong-doer, and the master, under the doctrine *respondeat superior*.²

§ 21. **Independent contractor.** — For the rule *respondeat superior* to obtain, the relation of master and servant, or superior and subordinate, must also exist, or there must be some obligation assumed toward the injured one, from which an equivalent relation in law would be implied.³ If the employee is in the service of an independent contractor, over whom the owner reserves no supervision or control, there can be no recovery from him, for an injury to such employee,⁴ for there is no liability for the negligent acts of a mechanic or contractor, employed as such, in an independent capacity over which he has the entire management and control.⁵ But if the employer reserves the right to

¹ *Harriman et al. v. Stowe*, 57 Mo. 93, 99; *Wright v. Compton*, 2 Mor. Min. Rep. 189; 53 Ind. 337. In this case, last cited, the injuries of the plaintiff resulted from blasting, in a quarry, near a road; both the servant, setting off the blast, and the master, were held liable.

² *Wright v. Compton*, 53 Ind. 337; 2 Mor. Min. Rep. 189. Liability to stranger and to employee the same, where injury results from defendant's negligence. *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; 10 Mor. Min. Rep. 674.

³ *Boswell v. Laird*, 8 Cal. 469; 10 Mor. Min. Rep. 616; *Roddy v. Mo. Pac. Co.*, 104 Mo. 234; *Zink v. Furnace Co.*, 10 Mo. App. 61; 82 Mo. 276.

⁴ "For the rule *respondeat superior* to apply, the relation of superior and subordinate must exist, or the master assume some obligation toward the servant, from which the relation, in law, would be assumed. If the employee is employed by an independent contractor, over whom the owner assumes no supervision, there can be no recovery from him, for an injury to such employee." *Boswell v. Laird*, 10 Mor. Min. Rep. 616; 8 Cal. 469; *Ziebell v. Eclipse Co.* (Wash. 1903), 15 Am. Neg. Rep. 457.

⁵ *Horff v. Green*, 168 Mo. 308; 67 S. W. Rep. 576. There is no liability for the negligence of a mechanic or contractor, employed in an independent business, over which the owner retains no supervision or control. *Painter v. Pittsburg*, 10 Wright, 213; *Roddy v. Mo. Pac. Co.*, 104 Mo. 234; *Harrison v. Kiser*, 79 Ga. 588; *Miller v. Min. &c. Co.*, 76

direct the manner of performance, or if he undertakes to provide the instrumentalities used, he is responsible, if an injury result to such contractor, or his employees, as a result of a breach of duty in that regard.¹ Nor would the relation of master and servant cease, so long as the owner retained any supervision of the work, or the means or appliances used by the contractor, but for any neglect by him, in this relation, from which an injury resulted, he would be responsible in damages.²

Iowa, 655; *Gas Co. v. Waters*, 123 Pa. 220. So an employee, in a shaft under the construction of independent contractors, could not recover from the mine owners for an injury resulting from the breaking of a rope, or other unsafe appliances. *Leudberg v. Brotherton Iron Min. Co.*, 75 Mich. 84; 42 N. W. Rep. 675. See for additional authorities *White, Mines & Mining Rem.*, Sec. 394, p. 523. If the contractor assumes all details of the work to himself and assistants and is paid by the job it is strong evidence that he is not an employee, but where the evidence is that master reserved the right of inspection and discharge, the case is properly left to the jury to determine the exact status of the parties. *Gayle v. Mo. C. & F. Co.*, 177 Mo. 427. In the old, well considered case of *Knight v. Fox*, 1 E. L. E. R. 477, the owner was held not liable for the act of an independent contractor, over whom the owner reserved no control.

¹ Where the employer reserves the right to direct the manner of performance, or where he undertakes to provide any of the instrumentalities used, he is liable if injury result to such contractor or his employees as a result of a breach of duty in that regard. *Roddy v. Mo. Pac. Co.*, 104 Mo. 234.

² The relation of master and servant does not cease so long as he reserves any control, or right of control, over the method and manner of doing the work, or the agencies by which it is effected. *Fell v. Rich Hill Coal Min. Co.*, 23 Mo. App. 216; *Lake Superior Co. v. Erickson*, 10 Mor. Min. Rep. 40; 39 Mich. 492. In *Fell v. Rich Hill Coal Co.* (23 Mo. App. 216), Phillips, J., observed: "The law ought not on well settled principles, be so construed as to acquit the actual owner of the mine, who has engaged another to open his mine, reserving to himself the obligation and burden of furnishing and operating that part of the machinery which occasions the injury to the employee. This duty he owes to the public and when he undertakes to so furnish and operate the machinery, which he knows will be used for a specific purpose in performing his part of the contract, with the contractor, in opening and

§ 22. **Lessor and lessee — Lessor's liability.** — The lessor does not impliedly warrant the condition of the demised premises to the lessee, and in the absence of misrepresentation or concealment, the lessee and his employees assume the risk from personal injuries received as a result of the defective or faulty condition of the premises.¹ And even when the lessor retains a portion of the premises in his possession, unless he was the active cause of the injury, he would not be liable to the lessee, if he could, himself, have prevented it, for he would then be held to have assumed the risk.² Where, however, the lessor retains a supervision or control over the portion of the demised premises, which causes the injury, and the tenant was denied access to and the right to remedy the same, the

operating the mine, the law would impose upon him the duty of providing reasonably safe machinery and appliances and as to that the relation of master and servant existed between them and the servant employed in mining in this shaft." *Chartiers Valley Gas Co. v. Waters*, 19 Pitts. Leg. J. 235; 23 W. N. C. 175; 16 Atl. Rep. 423; 46 Phil. Leg. Int. 169. And so if the work or the premises were so dangerous as to amount to a nuisance (*Crenshaw v. Ullman*, 113 Mo. 633), or if the contractor is known to be irresponsible, incompetent or negligent (*Brannock v. Ellmore*, 114 Mo. 65). If the owner personally interferes (*Long v. Moon*, 107 Mo. 834), or retains a supervision of and furnishes the means for accomplishing the work; — in all these cases the owner is liable, and the rule as to independent contractors does not apply. *Burns v. McDonald*, 57 Mo. App. 599; *Roddy v. Mo. Pac.*, 104 Mo. 234. The above decision as to a mine owner's liability to a contractor, where the former furnishes machinery to be used, is at variance with a recent Kentucky case, holding that the owner who lets a contract for the sinking of a shaft and agrees to furnish a "hoist" is not liable for an injury to the contractor's laborer, by the breaking of a rope, originally in good condition, but permitted to become defective by the contractor. *Central Coal & Iron Co. v. Grider*, 65 L. R. A. 455. See, also, *Lendberg v. Brotherton Min Co.*, 42 N. W. Rep. 675 (Mich.).

¹ *Brewster v. Defremery*, 33 Cal. 341; *Hazlett v. Powell*, 30 Pa. St. 293; *Jaffe v. Harten*, 56 N. Y. 398; *O'Brien v. Capwell*, 59 Barb. 497; *Leonard v. Storer*, 115 Mass. 86.

² *Dunn v. Coal Co.*, L. R. 7 Q. B. 244; *Tailor v. Bailey*, 74 Ill. 178. With delivery of possession, lessor's liability ceases. *Leonard v. Storer*, 115 Mass. 86.

lessor would be liable to his lessee, as well as to a stranger, for resulting injuries therefrom, for his own overt act was the cause of such injury.¹

¹ See *Fell v. Rich Hill Coal Co.* (28 Mo. App. 216), where lessor retained supervision of machinery in mine, which caused the injury and he was held liable therefor. See also *Taylor's Land. & Ten.* (7th Ed.), p. 141. A lessor is not liable for the wrongful acts or torts of his lessee, not done by his authority or command. *Little Schuylkill Coal Co. v. Richards*, 10 Mor. Min. Rep. 661; 57 Pa. St. 142; *Offerman v. Starr*, 2 Pa. St. 394; 44 Am. Dec. 211; 10 Mor. Min. Rep. 614; *Hartfield v. Roper*, 21 Me. 615; 84 Am. Dec. 273; *Samuelson v. Cleveland Iron Co.*, 49 Mich. 164; *Crusselle v. Pugh*, 67 Ga. 430; 44 Am. Rep. 724; *Smith v. Belshaw*, 26 Pac. Rep. 834. For an injury from a defect that existed at time of demise both lessor and lessee are liable, the one for negligence in leasing defective premises and the other for maintaining same. *Mancuso v. K. C.*, 74 Mo. App. 138. But for a condition brought about by some third party, without lessee's knowledge he would not be responsible. *Fehlhauser v. St. Louis*, 178 Mo. 636. And the lessor would not be liable for any injury after the demise unless it resulted from a defect existing when he executed the lease or amounted to a nuisance *per se*. *Fehlhauser v. St. Louis*, 178 Mo. 636. "Mere failure of a landlord to comply with his agreement to make repairs on the leased premises is held, in *Thompson v. Clemens*, not to render him liable for personal injuries suffered by a member of the tenant's family because of want of repair." 96 Md. 196; 53 Atl. Rep. 919; 60 L. R. A. 580. A mining lease will not relieve the owner from liability for personal injuries, where the lease is a mere subterfuge to avoid the responsibility for the operation of a mine. *Con. Coal Co. v. Seniger*, 179 Ill. 370; 53 N. E. Rep. 733. "Plaintiff was injured while in the employ of an iron company. After the injury the iron company leased its property to a steel company, which made formal announcement of such fact, and that the officers and employees of the iron company would be continued with the steel company. The lease, which was recorded, provided that the transfer should be regarded as taking effect prior to the date of the accident, and that all business transacted by the iron company after such date should be for the use and on account of the steel company. Held, that an action against the steel company for the injuries received would not lie." *Wieder v. Bethlehem Steel Co.* (Pa. 1908), 54 Atl. Rep. 788; 205 Pa. 186. "Where a level in a mine is in the same negligent condition when leased by the owner as at the time of a subsequent injury of an employe of the owner, in a shaft operated by him, resulting from such condition, the owner is responsible therefor." *Union Gold Min. Co. v. Crawford*, 69 Pac. Rep. 600.

§ 23. **Same — Lessee's liability.** — The general obligation is upon the tenant to so use the demised premises as not to injure others in the enjoyment of their rights, and for an injury from a neglect on his part to provide for the ordinary safety of the premises, or one resulting from his reckless management thereof, he would be liable to the injured one in damages.¹ Illustrative of the lessee's liability in cases of negligence, is an old case in New York, where the lessee failed to safely maintain a covering over an excavation near a highway, as a result of which an injury occurred and he was held liable therefor.² And not only does the duty of the tenant extend to his employees, to keep his premises reasonably safe, but he is also liable to all those coming upon his premises, by invitation, express or implied, for a failure to exercise reasonable care to make his premises safe.³ And even though the lessor might be liable to a third party, for an injury from an unsafe condition of the demised premises, this would not absolve the lessee from liability also, if he had been under a duty to repair or inspect the premises.⁴ But unless the lessee is guilty of gross negligence, he would not be responsible for an injury to a trespasser or licensee upon the demised premises, for, as to such, he is under no obligation to make his premises safe or sound.

§ 24. **Defendants jointly and severally liable.** — If two or more persons were engaged in a common under-

¹ *Fetel v. M. R. Co.*, 109 Mass. 398; *Taylor's Land. & Ten.*, Sec. 192, p. 161 (7th Ed.); *Althorf v. Woolf*, 22 N. Y. 366.

² *Congreve v. Smith*, 18 N. Y. 79.

³ *Carlton v. Iron Co.*, 99 Mass. 216; *P. R. Co. v. Kerr*, 25 Md. 521; *Indemauer v. Dames*, 1 H & R. 243; *L. R. 2 C. P.* 311.

⁴ *Fiske v. Bailey*, 51 N. Y. 150; *Radway v. Briggs*, 37 N. Y. 256; *Taylor's Land. & Ten.* (7th Ed.), Sec. 193, p. 163.

⁵ *Norris v. Litchfield*, 35 N. H. 271; *Roulston v. Clark*, 3 E. D. S. 366; *Lafayette Co. v. Adams*, 26 Ind. 370.

dertaking, such as a mining partnership, and as such caused the act which injured the plaintiff, they will be jointly or severally liable for the injury, as other joint tortfeasors.¹ Or, if the injury result from the negligent act of an agent or servant, in carrying out the direction of the principal, both will be liable to the injured party,² but both could not be sued in the same action, unless the principal and agent were joint actors, for the action against the former would be on the case, while the latter would be in trespass and they could not, at common law, be joined.³ Having thus examined into the basis of the action, and discussed some of the relations justifying different parties to sue, it is next suggested to consider some of the specific duties of the mine owner for the breach of which an action could be maintained.

¹ *Guile v. Swan*, 19 Johns. 381; *Old Colony &c. Co. v. Slavens*, 148 Mass. 363.

² *Hewett v. Swift*, 3 Allen, 420.

³ *Mulchey v. Met. Rel. Sol.*, 125 Mass. 487; *Buswell Per. Inj.*, Sec. 31, p. 37.

CHAPTER III.

DUTIES OF MINE OWNER.

SECTION 25. Must furnish reasonably safe appliances.

26. Duties imposed by statute.

27. Same — Means of ingress and egress.

28. Must repair appliances.

29. Same — Hidden defects and inappropriate use.

30. Should engage fit and competent employees.

31. Duty to employ sufficient number of servants.

32. Necessity for instruction and warning.

33. Neglect of warning by employee.

34. Necessity for established rules.

35. Same — Effect of rules.

36. Should make proper inspections.

37. Same — Statutes requiring inspections.

38. Employee not especially delegated need not inspect.

39. Must provide reasonably safe place.

40. Same — Duty cannot be delegated — Exception.

41. Same — Where work changes the place.

42. To whom the duty as to a reasonably safe place applies.

43. Illustrations of unsafe places in mines.

44. Owner should provide reasonably safe passageways.

45. Same — Contributory negligence in use of passageways.

§ 25. Must furnish reasonably safe appliances.— Mine employers are required to use reasonable care in the selection of machinery and appliances for their employees and for a failure to furnish reasonably safe machinery and appliances, in case of an injury therefrom, where the defect was known to the employer or should have been known to him and the employee was not aware of the defect, a liability would result.¹ But the rule is not so stringent as to

¹ "Appliances," in the broadest sense includes not only the machinery and tools and implements of the business, but those employed to use them as well. *Johnson v. Ashland Water Co.*, 71 Wis. 557; 37 N. W. Rep. 823;

require the employer to furnish absolutely *safe* appliances, for this would make him an insurer of the implements furnished. The test of liability, therefore, is not absolute safety, but ordinary care and diligence, and although the appliance may not be the safest, or newest of the kind, if it is such as is customarily used by ordinarily prudent men, in the same business, this would release the mine owner from responsibility for an injury from such tool or appliance.¹ The employer is not required to adopt every improvement or invention in connection with the appliances utilized by him,² nor is he liable for an injury resulting

Balley Mas. Lia. Inj. to. Serv., p. 15. "Where the defect through which an injury to an employee occurs is in the original construction of the appliances, knowledge by the master will be presumed." **Finnerty v. Burnham, 54 Atl. Rep. 996; 205 Pa. 305.** "The duty of the master to furnish the servant with safe appliances and a safe place in which to work is always to be considered in view of the character of work to be performed and the ordinary hazards of the employment." **Pressed Steel Car Co. v. Herath, 110 Ill. App. 596.** "Where the defects of an implement with which an employee is required to work are not so glaring as to threaten immediate danger, and are not such that a person of ordinary prudence would not have used the implement, an employee injured thereby is not precluded from recovering therefor against the employer on the ground that he was guilty of contributory negligence." **Robbins v. Big Circle Min. Co. (Mo. App. 1904), 79 S. W. Rep. 280.** "Mining companies are obligated to observe, not only the duties imposed by statute, but those which exist by virtue of the common law." **Junction Min. Co. v. Ench, 111 Ill. App. 346.**

¹ **Richardson v. Cooper, 88 Ill. 270; Payne v. Reese, 100 Pa. St. 301; Marsh v. Chickering, 101 N. Y. 400; 5 N. E. Rep. 56; Trask v. California &c. Co., 63 Cal. 96.** Where the evidence is conflicting the question of reasonable safety is for the jury. **Muirhead v. H. & St. J. Co., 103 Mo. 251; 15 S. W. Rep. 530.** But if the undisputed evidence shows *general use*, although not the safest, the defendant is not liable. **Lehigh Coal Co. v. Hayes, 128 Pa. St. 294; 18 Atl. Rep. 387; Works v. Nuttall, 119 Pa. St. 149; 13 Atl. Rep. 65.**

² **Southern Pac. Co. v. Seely, 152 U. S. 145; 14 Sup. Ct. Rep. 530;** Immaterial that later machines have covered cog wheels. **Townsend v. Langles, 41 Fed. Rep. 919; The Maharajah, 40 Fed. Rep. 784; Jackson v. Cornelia, 52 Hun, 377; 5 N. Y. Supp. 306.**

from a contingency that could not have been foreseen,¹ but he is bound to use reasonably safe machinery and appliances only. This generally is a jury question and dependent upon the facts of each particular case.

§ 26. **Duties imposed by statute.**—In most mining States different statutes have been passed, providing for the health and safety of persons employed in mines.² It is generally held to be negligence *per se*, on the part of a mine owner, to fail to perform the duties imposed upon him for the safety of his employees,³ and the rule is the same, whether the violation of the statute is an act of omission or commission.⁴ The intent of such statutes is not to make the mine owner an insurer of the safety of the men employed, but, as above stated, the failure to comply with the provisions of the statute, where an injury results from such failure, operates as actionable negligence on the part of the mine owner.⁵ To subject the owner to a liability for a failure to comply with a statutory duty, however, the failure to comply with the statute must have been

¹ Balley Mas. Lia. Inj. Ser., p. 19; Lilly v. N. Y. Cent. &c. Co., 107 N. Y. 566; 14 N. E. Rep. 508; Allison Co. v. McCormick, 118 Pa. St. 519; 12 Atl. Rep. 278.

² Hurd's Rev. St. Ill. 1901, p. 1202; Laws Mo. 1901, p. 211; R. S. Ohio, 1892, Sec. 6871; Pa. Act, June 2, 1891, Art. 7 (P. L. 189); Horner's Ann. St. Ind. 1901, Sec. 5169k; N. Y. Laws, 1902, p. 1738, c. 600.

³ Block Coal Co. v. Cuthbertson (Ind. App. 1908), 67 N. E. Rep. 558; Thirdevein Coal Co. v. Dielle, 110 Ill. App. 684.

⁴ Brower v. Lacke (Ind. App. 1903), 67 N. E. Rep. 1015; Cecil v. Amer. Sheet Steel Co., 129 Fed. Rep. 542.

⁵ So held as to Horner's Rev. St. Ind. 1897, Sec. 5480m, requiring mining boss inspections; Mooney Coal Co. v. Bracken (Ind. App. 1903), 66 N. E. Rep. 775. The legislature has a perfect right, for the safety and protection of laborers, to provide for the safety of the place, where they are to labor. Green v. American Foundry Co. (Ind. 1904), 71 N. E. Rep. 268. Any conscious violation of a statute for the protection of miners, is held, in Illinois, to be a "willful" violation. Riverton Coal Co. v. Shepard, 111 Ill. App. 294.

the approximate cause of the injury to the employee and if the injury would have resulted, notwithstanding a compliance with the statute, then no liability can be predicated on such failure to comply with the statute.¹

§ 27. **Same — Means of ingress and egress.** — It is one of the primary duties of the mine owner to furnish a reasonably safe and suitable means of ingress and egress for those engaged to labor in his mine.² The statutes of many of the mining States provide the kind of machinery to be used and the manner in which the different kinds of mining shall be carried on, with reference to the hoisting and lowering of persons in the mine.³ Generally, any violation of the statute, either of omission⁴ or commission,⁵ would constitute negligence *per se*. In an action

¹ *Davis v. Pa. Coal Co.*, 209 Pa. St. 153; 58 Atl. Rep. 271. The law of the State where an injury occurs, governs the right of the plaintiff to recover. *Johnson v. Union Pac. Coal Co.*, 76 Pac. Rep. 1089. An action in Missouri, which occurred in Iowa, is governed by Iowa laws. *Williams v. C, R. I. & P. Co.*, 106 Mo. App. 61; 79 S. W. Rep. 1167.

² *White, Mines & Min. Rem.*, Sec. 395, p. 524; *Cambria Iron Co. v. Schaffer* (Pa.), 5 Cent. 804; *Blanchard & Weeks Ld. Cas.*, p. 632 and cases cited. "One who lets workmen down into his mine is bound to bring them up safely." *Bryden v. Stewart*, 2 Mac. I. Sc. App. 304.

³ *Laws, Mo.* 1901, p. 211, amending R. S. Mo. 1899; *Hurd's R. S. Ill.*, 1901, p. 1202; *Civil Code Cal.* 1881.

⁴ "The failure of a master to perform the statutory duties imposed on him for the safety of his employees is negligence *per se*." *Diamond Block Coal Co. v. Cuthbertson* (Ind. App. 1903), 67 N. E. Rep. 558; *Spiva v. Coal Co.*, 88 Mo. 68.

⁵ "The doing of an act by an employer which is prohibited by statute is negligence *per se*." *Brower v. Locke* (Ind. App. 1903), 67 N. E. Rep. 1015. An employee was killed in Illinois, as a result of a violation by the employer, of the Act of 1873, Ch. 98, preventing the hoisting of coal while a miner was being hoisted or lowered in the mine, by a piece of coal falling upon him. The employer was held liable for this violation of the statute and there was held to be no variance between the evidence, which showed that the employee had just got upon the cage, and the petition, which charged that he was ascending, at the time he was struck by the coal. *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; 10 Mor. Min. Rep. 684.

under a statute for failure to provide the means of hoisting and lowering persons in the mine, the questions to be determined are, whether the given statute applies;¹ if so, have the requirements of the law been complied with,² and if not, was the failure to comply with the statute the approximate cause of the injury.³ But such statutes

¹ "Rev. Stat. Mo., 1899, § 8811, provides that every owner, agent or operator of every mine operated by shaft, shall provide suitable means for signaling, and cages covered with boiler iron for the safety of persons descending and ascending the shaft, and requires that guides shall be placed in the sides of the shaft, with brakes, and that such cage shall be fitted with spring catches, to prevent accidents in consequence of the cable breaking, etc. *Held*, that a petition thereunder for decedent's death, alleging negligence in the selection of the material for the construction of the derrick and hoist, and in failing to put a roof over the derrick, and in the construction of the brake on such derrick, did not allege negligence in any act required by the statute; it being enacted for the protection of persons conveyed up and down the shaft, and having no application to a hoister, whose business it was to run the hoisting appliance." *Barron v. Missouri Lead & Zinc Co.* (Mo. 1908), 72 S. W. Rep. 534.

² "Hurd's Rev. Stat. 1901, p. 1202, entitled "An act to provide for the health and safety of persons working in coal mines," providing for ventilation, automatic permanent doors, etc., and also providing in Section 19, cl. "f.," that at all principal doorways through which cars are hauled an attendant shall be employed to open and close "said doors when trips of cars are passing to and from the workings," imposes a duty on the mine owners to maintain attendants at principal doors, not only to assist in ventilation, but to protect miners passing through the doorways from injury." *Himrod Coal Co. v. Stevens*, 67 N. E. Rep. 389; 203 Ill. 115; affirming, 104 Ill. App. 639.

³ *Caldwell v. Brown*, 53 Pa. St. 453; *Smith on Master & Servant*, 134; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Durant v. Lexington Coal Co.* 97 Mo. 62; *Harris Dam. by Cor.*, § 988, p. 1140. As to duty to maintain safe means of ingress and egress, see *Wesley Coal Co. v. Healer*, 84 Ill. 626; *Hamilton v. State*, 101 Ill. 387; *Chicago Coal Co. v. People*, 181 Ill. 270; *Haddock v. Com.*, 103 Pa. St. 243; *McDonald v. Rockhill Co.*, 135 Pa. 1; 20 Am. & Eng. Enc. Law, pp. 58, 59. In *Alaska United Gold Min. Co. v. Muset* (114 Fed. Rep. 66), the air had been cut off, under order of the defendants foreman and after lighting blasts in the mine deceased and his co-worker signaled the hoister man to take them out. They were unable to make him hear and as the owner had provided no

were not intended to make the mine owner an absolute insurer of the safety of his men and notwithstanding a failure to comply with the statute, an injured employee would be prevented from recovery if his own recklessness occasioned the injury, and contributory negligence would be a complete defense to such an action, the same as other negligence cases.¹

other means of exit, it was held to be negligence in not providing a proper means of ingress and egress. See, also, *Downey v. Gemini Min. Co.*, 24 Utah, 481; 68 Pac. Rep. 414. Lowering men into a mine, without first seeing that shaft is clear of obstructions, is such negligence as to render employer liable. *Alaska United Gold Min. Co. v. Keating*, 116 Fed. Rep. 561. Where the engineer or operative in charge of a hoisting apparatus is reckless the master will be liable, if he had time to have discovered his incompetency. *Princeton C. & M. Co. v. Roll. (Ind.)*, 66 N. E. Rep. 169; *Wickland v. Coal Co. (Iowa.)*, 98 N. W. Rep. 305. An employee violating a rule in using a cage, instead of a ladder to ascend from a mine, cannot recover. *Anderson v. Mikado Min. Co.*, 3 Ont. Law Rep. 581. For instructions as to owner's duty to keep hoisting apparatus and mouth of shaft in a reasonably safe condition, see *Knight v. Sadtler Lead & Zinc Co.*, 91 Mo. App. 574.

¹ *Finalyson v. Utica Min. Co.*, 67 Fed. Rep. 507; *Adams v. Min. Co.*, 85 Mo. App. 486; *Blanchard & Weeks Ld. Cas.*, p. 633; *White Mines & Min. Rem.*, Sec. 395, p. 525, and cases cited. If a hoisting apparatus is out of repair long enough to have enabled the owner to discover it he is guilty of negligence in not repairing same. *Morgen v. Mining Co.*, 26 Utah 174; 72 Pac. Rep. 688. In *Durant v. Coal Co.* (97 Mo., p. 66), the contention was made that because plaintiff had knowledge of the failure to provide a cage, covered with boiler iron, as the statute required, he assumed the risk. This construction, the court held, would nullify the statute. But otherwise as to contributory negligence. If dangers from a compliance with the statute were obvious, the Court of Appeals, of Kansas City, held this would be a good defense to an action under the prop statute. *Adams v. Coal Co.*, 85 Mo. App., p. 493. But there can be no assumption of the risk from a failure to comply with statutory duty. See *Coal Co. v. Swaggerty*, 150 Ind. 664; 65 N. E. Rep. 1026; *Green v. Amer. Co.* 30 Wash. 87; 70 Pac. Rep. 310. But for reason why such defense should prevail, see *Dresser Emp. Liab.*, pp. 602, 605 and cases cited. Under the Mines and Miner's Act, Illinois (2 Starr & C. Ann St. 1896, c. 93), which expressly requires a mine owner to furnish sufficient light on the top and bottom of the shaft to insure, as far as possible, the safety of persons getting on and off the

§ 28. **Must repair appliances.**—Not only is the employer liable for an injury resulting from an appliance or machine, not reasonably safe and sound, but he is also liable for an injury from permitting a machine or appliance to become so dangerous, by want of repair, as to occasion an injury,¹ for the duty is a continuing one and applies not only to the original condition of the appliance, but to its maintenance in a reasonably safe condition, as well. But notice of a necessity for repair should be brought home to the employer, in order to render him liable upon such a charge of negligence, and if the appliance was not of defective construction or material, but the injury resulted solely from a want of repair and the master had no knowledge of such condition, or of facts which would charge him therewith, then he would not be liable for such resulting injury.² Nor would the employer be liable for a failure to observe the proper regulation or repair of a machine or appliance, where its regulation necessarily depended

cage, the fact that the miner knew that there was no light at the bottom of the shaft is not a defense to an action by the miner for injuries." *Spring Valley Coal Co. v. Patting* (Ill. 1904), 71 N. E. Rep. 871. Where a miner is injured on account of the negligent construction of a tramway which was not blocked, but let a car fall into the mine, the owner is liable. *Union Gold Min. Co. v. Crawford*, 29 Colo. 511; 69 Pac. Rep. 600.

¹ *Morgen v. Mining Co.*, 26 Utah, 174; 72 Pac. Rep. 688; *Sherman v. Menominy Co.*, 72 Wis. 122; 89 N. W. Rep. 365. An ordinary hammer, to be used by hand, is not a "machine." *Georgia R. & B. Co. v. Nelson*, 82 Ga. 70; 9 S. E. Rep. 1049. A worn, uneven maul is a dangerous tool. *Chicago &c. Co. v. Blevins*, 46 Kan. 370; 26 Pac. Rep. 687. The duty to repair appliances cannot be delegated, so as to avoid liability. *Carter v. Oil Co. (S. C.)*, 18 S. E. Rep. 419. But see, *contra*, *Bemisch v. Roberts* (Pa.) 21 Atl. Rep. 998.

² Nor would notice to a fellow-servant be sufficient. It must be to someone whose duty it is to repair. *Richardson v. Casper*, 88 Ill. 270. A mere failure by a landlord to repair will not make him liable for personal injuries to his tenant. *Thompson v. Clemens*, 96 Md. 196; 53 Atl. Rep. 919; 60 L. R. A. 580.

upon the party using such appliance, or where the duty to repair was on the servant, for in such case the duty to see to the proper repair or regulation of the appliance would be upon the employee using the same and not upon the master.¹ However, an employer is chargeable with the ordinary knowledge of decay and wear from use of a machine or appliance, and where a given machine has become dangerous by long use, without repair, this would be sufficient to render the employer responsible for a resulting injury, for it would be unreasonable to permit him, for a great length of time, to pay no attention to a machine or appliance likely to wear out or decay, and then, when an employee was injured, to avoid liability on the original fitness of the appliance.²

§ 29. Same — Hidden defects and inappropriate use. — Since the test of the master's liability for injuries from defective machinery or appliances is but ordinary care, he would not be liable for an injury resulting from a hidden defect in a machine or appliance, for such defect would not be discoverable by ordinary diligence, on proper inspection.³ Mere proof of an injury from a hidden defect.

¹ So held as to adjustment and placement of planks on a scaffold used by employee. *Jennings v. Iron Bay Co.*, 47 Minn. 111; 49 N. W. Rep. 685; *Carlson v. Ry. Co.*, 21 Oregon, 450; 28 Pac. Rep. 497; *Bryant v. Ry. Co.*, 65 Iowa, 805; 23 N. W. Rep. 678; *Balley Mas. Lia. Inj. Serv.*, p. 83.

² *Balley Mas. Lia. Inj. Serv.*, p. 83; *Rapho v. Moore*, 68 Pa. St. 404; *Ind. Co. v. Parker*, 100 Ind. 193. If a shaft or hoisting apparatus is out of repair a sufficient length of time to have enabled the owner to discover it, he is guilty of negligence in not repairing same. *Morgen v. Mammoth Mining Co.*, 26 Utah, 174; 72 Pac. Rep. 638.

³ Proof of a mere latent defect does not make out a *prima facie* case of neglect. *O'Donnell v. Baum*, 38 Mo. App. 245. Whether defect could have been discovered by ordinary care, where evidence is conflicting, is for the jury. *Guthridge v. Ry. Co.*, 105 Mo. 520; 16 S. W. Rep. 943. It is error to let a jury pass upon the quality of iron in a broken pin, the presumption and evidence all being that it is good. *Phila. Co. v. Hughes*, 119 Pa. St. 801; 13 Atl. Rep. 286.

would not, therefore, constitute a *prima facie* case of negligence;¹ if all the evidence developed that a proper inspection would have disclosed the defect, then a failure to inspect would render the master liable.² Undisputed proof that proper inspection would not have disclosed the defect would relieve the master of liability³ and if the evidence of the result of proper inspection should be conflicting, it would be an issue for the jury to decide.⁴ Nor would the employer be liable to an employee for an injury from an unauthorized or inappropriate use of a tool or appliance,⁵ not only because such use and injury could not have been foreseen and avoided, but also because the unauthorized use of such appliance would itself be a negligent act, and to hold the master responsible therefor, or for an injury from a hidden defect, which could not have been foreseen and guarded against, would make of him an insurer of the safety of his various employees.

§ 30. Should engage fit and competent employees.—It is also one of the duties of the mine employer to use reasonable diligence to engage fit and competent servants for work in and about his mine,⁶ and for an injury result-

¹ O'Donnell v. Baum, 38 Mo. App. 245.

² Bessex v. Ry. Co., 45 Wis. 481; Finnerty v. Burnham, 205 Pa. St. 805; 54 Atl. Rep. 996.

³ Ardesco Oil Co. v. Filson; 63 Pa. St. 150; Richmond Co. v. Elliott, 149 U. S. 266; 13 L. P. Rep. 837.

⁴ Guthridge v. Ry. Co., 105 Mo. 520; 16 S. W. Rep. 943.

⁵ C., B. & Q. Co. v. Abend, 7 Ill. App. 130; Bailey Mas. Lia. Inj. Serv., p. 22. "Where the master furnishes adequate appliances for the work, he is not liable for injuries to a servant resulting from a part of the apparatus furnished by him being used in conjunction with an implement not furnished by him, but substituted without his notice, even though his foreman was instrumental in the use of such implement." Hackett v. Masterson, 84 N. Y. S. 751.

⁶ Morse v. Glendon Co., 125 Mass. 282; Rummell v. Dilworth, 111 Pa. St. 349; 2 Atl. Rep. 355. An employer owes it to his employees to discharge an unfit or incompetent servant. Brookside Coal Co. v. Dolph.

ing from his neglect in employing an incompetent servant,¹ or in retaining such an employee in his service, after knowledge of his unfitness,² the master would generally be liable in damages to the injured employee. The employer, in the absence of evidence to the contrary, is presumed to have discharged his duty in selecting fit and competent employees,³ and so the burden of establishing the alleged unfitness of the employee, whose acts occasioned the injury complained of, is upon the plaintiff in the case and not only knowledge of such unfitness on the part of the employer, or proof of such specific acts of incompetency or habitual unfitness, as to charge him, in law, with notice of the fact.⁴ A single act of incompetency is not sufficient to make out an incompetent servant, or to bring notice of the fact to the employer,⁵ but to justify such a charge the alleged employee must be proven to be habitually negligent or incompetent.⁶ Some of the cases hold that the reputation of the alleged incompetent servant may be

101 Mo. App. 169. A master is liable for the incompetency of the operative or engineer in charge of hoisting apparatus, if he had time to have discovered his unfitness. *Princeton C. & M. Co. v. Roll*, 66 N. E. Rep. 169; *Wicklund v. Coal Co.*, 93 N. W. Rep. 305.

¹ *Bailey Mas. Lia. Inj. Serv.*, p. 47, and cases cited. But the mere fact of incompetency will not, of itself, justify a holding that employer was negligent in hiring such servant. *Big Stone Gap Iron Co. v. Ketron* (Va. 1903), 45 S. E. Rep. 740.

² Actual knowledge of the servant's unfitness is not essential, if he was retained a sufficient length of time to charge the employer with notice of his unfitness. *Bailey Mas. Lia. Inj. Serv.*, p. 47. And this is the rule as to habitual drunkenness of employee. *Kean v. Copper Mills*, 66 Mich. 284; 33 N. W. Rep. 395.

³ *Hilts v. Ry. Co.*, 55 Mich. 444; 21 N. W. Rep. 878.

⁴ Other specific acts may be proven. *Bailey Mas. Lia. Inj. Serv.*, p. 57. But not to establish negligence in the act complained of. *Idem.* *Mich. Cent. Co. v. Gilbert*, 46 Mich. 179; 9 N. W. Rep. 243; *Lee v. Reg. Co.*, 87 Mich. 544; 49 N. W. Rep. 909. But see, *contra*, *Holt v. Nay*, 144 Mass. 186; 10 N. E. Rep. 807.

⁵ *Couch v. Coal Co.*, 46 Iowa, 17; *Huffman v. Ry. Co.*, 18 Mo. 50.

⁶ *Baltimore Co. v. Neal*, 65 Md. 438; 5 Atl. Rep. 338.

offered in evidence for the purpose of showing the opportunity of the master to have known of his unfitness,¹ but where this is relied on the plaintiff should also be chargeable with notice if he has had the same opportunity as his employer to know or observe the acts of the alleged incompetent servant, and if he had such knowledge or means of knowledge and continued work without complaint, he would be held in law to have assumed the risk of injury from the unfit servant.²

§ 31. Duty to employ sufficient number of servants.— It is also one of the duties incumbent upon the employer of laborers, to see to it that a sufficient number of men are engaged to conduct his work in a reasonably safe manner, and for an injury to a laborer in not having a sufficient force of men employed to do the work in a reasonably safe manner, the employer would be responsible.³ But this risk, like any other in the service, can be assumed by the employee and if an experienced employee in the service of his employer, being fully informed as to the character of his work, and realizing the danger of attempting to do it without a greater force of men, or additional assistance, undertakes to do a piece of work without coercion, on the master's part, and is injured as a result, he cannot recover for his injuries.⁴

§ 32. Necessity for instruction and warning.— It is the duty of the employer to instruct or warn such of his em-

¹ *Manshon v. Worcester*, 150 Mass. 489; 23 N. E. Rep. 228.

² *Mad River Co. v. Barber*, 5 Ohio St. 563.

³ *Flike v. B. & A. R. Co.*, 53 N. Y. 550; *Bailey Mas. Liab. Inj. Serv.*, p. 68.

⁴ *Mayott v. Narcross (R. I.)*, 52 Atl. Rep. 894. Where the negligence counted on is a failure to provide the plaintiff a helper, the petition is defective if it does not specify the reasons for the necessity for a helper. *Lee v. Kansas City Gas Co.*, 91 Mo. App. 612.

ployees as may not be familiar with the hazards of his business, on account of youth or inexperience, of all hidden dangers and such open, obvious risks, as are known, or should be known and understood by the employer, and are not known by such employees.¹ The uninformed employee is usually entitled to sufficiently definite information as to the risk to be encountered to enable him to judge for himself whether or not he wants to assume the risk after a full knowledge of what it implies.² And where an inexperienced employee is injured, as a result of the failure of the master to instruct him of unknown dangers, the fact that the negligence of a fellow-servant concurred to oc-

¹ *Strahlendorf v. Rosenthal*, 80 Wis. 674; 10 Mor. Min. Rep. 676; *Rummell v. Dillworth*, 111 Pa. St. 342; 2 Atl. Rep. 355; *Keller v. Schwenk*, 151 Pa. St. 519; 25 Atl. Rep. 180. In *Strahlendorf v. Rosenthal* (80 Wis. 674; 10 Mor. Min. Rep. 676) the plaintiff was injured by a shaft caving in, as a result of a fissure, unknown to plaintiff, but known to defendant. It was held that the plaintiff should have been warned of the danger. See also *Parkhurst v. Johnson*, 50 Mich. 70, and *McGowan v. La Plata Co.*, 10 Mor. Min. Rep. 59. In *Mather v. Rillston* (156 U. S. 391), it was held to be negligence on the part of an employer, not to inform an employee of the storage of dynamite and explosives. An inspection or examination of the dangerous place by an employee, will not dispense with employer's warning of dangers, where it is otherwise necessary. *Western Stone Co. v. Muscial*, 196 Ill. 382; 63 N. E. Rep. 664; *Giordano v. Granite Co.*, 52 Atl. Rep. 332.

² *McGowan v. La Plata M. & S. Co.*, 9 Fed. Rep. 861; *Baxter v. Roberts*, 44 Cal. 188; *Bailey Mas. Lia. Inj. Serv.*, p. 122. In *McGowan v. La Plata Min. & Smelting Co.* (9 Fed. Rep. 861), the explosive effect of pouring hot slag in water was held to be such an unusual danger as to require instruction by the master. See also *Fox v. White Lead Co.*, 84 Mich. 676; 48 N. W. Rep. 203; *Spilman v. Fisher Iron Co.*, 56 Barb. 151. In *Parkhurst v. Johnson* (50 Mich. 70; 15 N. W. Rep. 107), an inexperienced employee was placed, without instruction, at work crowding lime down into the kiln, by jumping or treading on it and stepping off just as it descended. The employee failed to step away as the rock started down, but fell with it into the crater and was killed. The employer was held liable. This holding is criticised by Judge Bailey in his excellent work (on the *Lia. Mas. for Inj. Serv.*, p. 125), on account of the obvious danger of the work.

casation the injury is no defense, for the employer is responsible for injuries from his own negligence, concurring with that of a fellow-servant of the injured employee.¹ But it is not every danger that an inexperienced employee must be warned or instructed about. Even inexperienced employees are presumed to know what common observation teaches all men, and as to open, obvious danger, no warning or instruction is required.² As to matters which the employee actually knows,³ or which he would be legally presumed to know,⁴ therefore, no instruction would be required. The employee is generally required to show that he not only had no knowledge of the danger that he charges his employer should have fully advised him of, but also that it was of such a character that his employer would not be justified in presuming knowledge on his part,⁵ and where these questions are in doubt the fact of the employee's want of knowledge and whether or not he should be presumed to know of the dangers, would be a jury question.⁶

§ 33. **Neglect of warning by employee.** — An employee who proceeds in a dangerous method of doing his work after warning, or instruction, on the part of the employer, assumes the risk of subsequent injuries therefrom and cannot recover if he is injured after receiving a timely warning, if he continues to do his work in a dangerous manner, unmindful of the warning given him.⁷

¹ *Jones v. Florence Mining Co.*, 66 Wis. 283; 28 N. W. Rep. 207.

² *Lyttle v. C. W. M. Co.*, 84 Mich. 289; 47 N. W. Rep. 573.

³ *Coullard v. Tecumseh Mills*, 151 Mass. 85; 23 N. E. Rep. 731.

⁴ *Ford v. Anderson*, 139 Pa. St. 263; 21 Atl. Rep. 18; *Tagg v. McGeorge*, 155 Pa. St. 368; 26 Atl. Rep. 671; *Pratt v. Prouty*, 153 Mass. 334; 26 N. E. Rep. 1002.

⁵ *Rock v. Orchard Mills*, 142 Mass. 522; 8 N. E. Rep. 401.

⁶ *Wynne v. Conklin*, 86 Ga. 40; 12 S. E. Rep. 188; *Bailey Mas. Lia. Inj. Serv.*, p. 118.

⁷ So held, in Alabama, as to a miner who ignored a warning of the

§ 34. **Necessity for established rules.**—It is only where the nature of an employer's business is so extensive as to necessitate such a large number of employees and so intricate means and methods of work, that the business cannot be safely conducted without it, that rules are required to be established for the conduct of the business by the employer.¹ Whether the business is of such scope and magnitude is usually a question of fact for the jury.² If the business of a mine owner was small and but few men were employed by him and the business could be safely run, without established rules, then the owner would not be required to establish rules for the government of his employees.³ But where the business was extensive and a large number of men were employed and the safety of the men required it, and others in the same locality with a similar business, had established rules, then the employer might be held responsible for an injury, based upon neglect in this particular.⁴ The reasonableness of a given

foreman to trim the roof or prop it. *Pioneer Min. Co. v. Thomas*, 133 Ala. 279; 32 So. Rep. 15. An employee using a cage instead of a ladder, in violation of instructions, cannot recover. *Anderson v. Mikado Min. Co.*, 3 Ont. Law Rep. 581.

¹ *Smith v. Iron Co.*, 42 N. J. L. 467; *Bailey's Mas. Lia. Inj. Serv.*, p. 72; *Ford v. Fitchburg Co.*, 110 Mass. 240. Whenever the business of an employer of men is so large as to make his personal supervision impractical, he should promulgate proper rules. *Glordana v. Granite Co.* (Del.), 52 Atl. Rep. 332.

² *McGovern v. Ry. Co.*, 123 N. Y. 289; 25 N. E. Rep. 373. By the English "coal mine regulation act of 1872 (35 and 36 Vict., ch. 76, Sec. 52)" power is given to the mine owner to frame special rules for the conduct of persons employed by him, providing penalties for violation of the rules. A violation of the rule, if the cause of an injury, would preclude a recovery. *Highorn v. Wright*, L. R. 2 C. P. 397; 10 Mor. Min. Rep. 24; *Senior v. Ward*, 1 E. & E. 385; 10 Mor. Min. Rep. 646.

³ *Morgan v. Ore & Iron Co.*, 133 N. Y. 666; 31 N. E. Rep. 234. In this case, where employer operated ore kilns, it was held that he need not establish a set of rules.

⁴ *Lewis v. Selfert*, 116 Pa. St. 628; 11 Atl. Rep. 514. "A rule promulgated by a mining company, forbidding miners from leaving a partic-

rule, when established, is a question of law for the courts.¹ An injured employee cannot usually question the reasonableness of a rule of his employer, adopted to secure the safety of his workmen,² and if the injured employee had violated a known rule of the employer at the time of his injury, he will be denied a recovery, if the violation of the rule contributed to his injury.³

§ 35. **Same — Effect of rules.** — A mine owner has the same right as any other employer of men to adopt reasonable rules for the protection of the men employed by him and for the regulation of his business, and if the men violate the rules and are injured as the result of such violation, this would be such contributory negligence as would preclude a recovery.⁴ But a mine owner cannot adopt and post rules that all of his employees entering his service assume the risks of injuries from unsafe roofs or falling slabs, for such a rule, in enabling such owner to take advantage of his own neglect to properly timber or trim

ular portion of the mine at a particular hour, is contrary to the statute, in so far as it may forbid a miner from leaving the mine when he has been prevented from doing farther work." *Junction Min. Co. v. Ench*, 111 Ill. App. 346.

¹ *Ill. Cent. Co. v. Whittemore*, 43 Ill. 420; *Old Colony Co. v. Tripp*, 147 Mass. 35; 17 N. E. Rep. 89; *Vedder v. Ellows*, 20 N. Y. 126. But see, *contra*, *Prather v. Ry. Co.*, 80 Ga. 427; 9 S. E. Rep. 530.

² *Bailey's Mas. Lia. Inj. Serv.*, p. 85; *Stephens v. Ry. Co.*, 86 Me. 221. "Willful disobedience of a rule forbidding miners employed in a mine from leaving a particular portion thereof at a particular time is not established where a miner left contrary to such rule because of his sickness." *Junction Min. Co. v. Ench*, 111 Ill. App. 346.

³ *Robertson v. Corlueson*, 84 Fed. Rep. 716; *L. & N. Co. v. Wilson*, 88 Tenn. 316; 12 S. W. Rep. 720; *Schwab v. H. & C. Co.*, 106 Mo. 74; 16 S. W. Rep. 924.

⁴ *Schwab v. H. & St. J. Co.*, 106 Mo. 74. But an employee who could not read would not be charged with notice of a printed rule, that he assumed risk of falling slabs. *Himrod Coal Co. v. Clark*, 197 Ill. 514; 64 N. E. Rep. 282.

the roof of his mine, would be unreasonable and against public policy.¹ And even though a mine owner's rules are reasonable and proper, if the owner knows that his employees have customarily violated his rules, in case of an injury therefrom, he will be held liable to the injured employee.²

§ 36. **Should make proper inspections.** — Like the duty to repair and keep safe, complicated and dangerous machinery or appliances, likely to become dangerous by the wear and tear incident to continued use, is the correlative duty to properly inspect such appliances, without which, the necessity for such repairs, or other precautionary measures, would not be discovered by the employer.³ Where dangerous or complicated tools or machinery are utilized by the employer, likely to become dangerous by repair, he owes to his employees a positive and continuous duty to make proper and frequent inspections.⁴ The duty is not confined to tools and appliances in use, but extends to all departments of the master's service, where injury might result to his employees, if such precautions were neglected,⁵ and the frequency and particularity of such inspections necessarily differs with the risks and liability for injuries in the different departments of the work.⁶ Mining being an extremely hazardous business, in most of its details, more frequent and skillful inspections are required than would obtain in a business attendant with less dan-

¹ Consolidated Coal Co. v. Lundak, 196 Ill. 594; 63 N. E. Rep. 1079; Himrod Coal Co. v. Clark, 197 Ill. 514; 64 N. E. Rep. 282.

² Brookside Coal Co. v. Dolph, 101 Ill. App. 169.

³ Cooley on Torts, p. 557; Bailey's Mas. Lia. Inj. Serv., pp. 95, 101.

⁴ N. P. Co. v. Heiberd, 116 U. S. 652; 6 Sup. Ct. Rep. 590; Brown v. R. R. Co., 53 Iowa, 595; 6 N. W. Rep. 5; Bessex v. R. R. Co., 45 Wis. 481; Flesh v. W. U. Co., 181 N. Y. 604; 30 N. E. Rep. 196.

⁵ Bailey Mas. Lia. Inj. Serv., p. 95; Morton v. Ry. Co., 81 Mich. 433; 46 N. W. Rep. 111.

⁶ Van Dusen v. Lepellier, 78 Mich. 502; 44 N. W. Rep. 572.

ger,¹ and a failure to inspect will render the mine owner liable, if a careful inspection would have disclosed the defect that caused the injury.² Nor would mere proof of an inspection relieve the employer, for he is liable, unless a careful inspection was made,³ and the care required would correspondingly increase with the dangerous character of the ground,⁴ machinery or appliance.⁵ But a mere failure to inspect is not, of itself, proof of negligence, unless the dangerous nature of the place, or appliance, is such as to require an inspection on the employer's part, in the exercise of due care as a precautionary measure against probable injuries.⁶ An employer cannot, generally, be said to be negligent in failing to inspect, where he has used due care in the selection of approved appliances and the defect was not open and obvious, as he has a right to rely upon the reputation of the manufacturer.⁷ Nor would inspection be

¹ White Mines & Min. Rem., Sec. 453, p. 605, and cases cited.

² Benging v. Steinway, 101 N. Y. 550; McCane v. Gallagher (N. Y.), 2 Am. Neg. Rep. 613.

³ Con. Co. v. Parker, 100 Ind. 181; Durkin v. Sharp, 88 N. Y. 225; Eran v. Ry. Co., 42 N. Y. Supp. 188; Ry. Co. v. Ward, 1 Am. Neg. Rep. 590; White Mines & Min. Rem., Sec. 458, p. 605.

⁴ Hammon v. Coal Co., 156 Mo. 237.

⁵ Buswell Per. Inj., Sec. 211. The law does not require the master to make inspection of shots that have failed to go. Brown v. King, 100 Fed. Rep. 561. For cases predicated upon negligence in failing to inspect appliances, see Bailey's Mas. Lia. Inj. to Serv., 93 to 103; Bowman v. White, 110 Cal. 23; Mo. Coal. Co. v. Schwab, 74 Ill. App. 567; Ashland Coal Co. v. Wallace, 101 Ky. 626; Smizel v. Iron Co., 116 Mich. 149; Sykes v. St. L. & S. F. Co., 88 Mo. App. 193; Mansfield Coal Co. v. McEnry, 91 Pa. St. 185; Chicago Coal Co. v. People, 181 Ill. 270; 20 Am. & Eng. Enc. Law (2 Ed.), 89. But if inspection retards work (Island Coal Co. v. Greenwood, 151 Ind. 476), or if inspection would only develop a matter of common knowledge, it is not necessary. Garragan v. Falls River Iron Co., 158 Mass. 596; Shea v. K. C., F. S. & M. Co., 76 Mo. App. 29; 20 Am. & Eng. Enc. Law (2 Ed.), p. 89.

⁶ Morgen v. Ore Iron Co., 133 N. Y. 666; 31 N. E. Rep. 234.

⁷ Ardesco Oil Co. v. Gilson, 63 Pa. St. 150; Boswell v. Laird, 8 Cal. 469; Richmond Co. v. Elliott, 149 U. S. 266; 13 Sup. Ct. Rep. 837.

required where the employee had equal or superior means of knowledge to his employer,¹ for if the danger is as open to one as to the other, there would be no duty to inspect.

§ 37. **Same — Statutes requiring inspections.** — The “Health and Safety” statutes of the mining States, with a view of further safeguarding the health and lives of miners, and to prevent the employer from overlooking necessary precautions, require daily or frequent inspections of all dangerous working places.² Like other statutory duties imposed upon the mine owners, a failure to comply with the requirements of a statute requiring inspections, if an injury results as a consequence, will, of itself, constitute actionable negligence on his part.³

§ 38. **Employee not especially delegated need not inspect.** — A servant is not required to inspect for latent defects, at any time, but is entitled to assume that his employer has discharged his duty in furnishing him reasonably safe and proper appliances.⁴ The distinction between the duty of the servant and the master, in this regard, is emphasized in a recent Kentucky case, where it is held that the master must know that the place in which the servant must do his work, is reasonably safe for the purpose, unless its condition is so recent, that by ordinary care he could not have learned of it in time to have prevented the servant’s injury; but a servant is only bound to

¹ *Gerrigan v. Iron Co.*, 158 Mass. 596; *Shea v. Ry. Co.*, 76 Mo. App. 29.

² *Horner’s R. S. Ind.*, 1897, Sec. 5480m; *R. S. Mo.* 1899, 8802 *et seq.*

³ *Wooley Coal Co. v. Bracken* (Ind. App. 1903), 66 N. E. Rep. 775; *Himrod Coal Co. v. Stevens*, 104 Ill. App. 639; affirmed, 203 Ill. 115; 67 N. E. Rep. 389; *Brewer v. Locke* (Ind. 1903), 67 N. E. Rep. 1015; *Diamond Block Coal Co. v. Cuthbertson* (Ind. 1903), 67 N. E. Rep. 558.

⁴ *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185; *Chicago &c. Co. v. Tackett* (Ind. App. 1904), 71 N. E. Rep. 524.

avoid the dangers of which he knows, or which, in the course of his work, he could not fail to discover, except by reason of his own neglect.¹ Accordingly, in that State, it is held, that an employee assisting an engineer to locate an entry to a coal mine, has a right to presume that the master has inspected the roof to prevent falling coal, and, for an injury from such cause, although he did not inspect the roof, he can recover.² Another illustration of the same rule, is a recent Oregon case, where it was held that a miner employed to drill holes in the mine need not inspect the timbering or condition of the rock above him, but had a right to assume that the master would inspect and make the roof reasonably safe, and to proceed with his work, relying on such assumption, unless a reasonably prudent man, in the performance of his work, would have learned facts which would have charged him with knowledge of the danger.³

§ 39. **Must provide reasonably safe place.** — The duty of the employer, in all the different vocations of life, with reference to providing a reasonably safe place in which his employees are required to work, necessarily differs according to the character of the business in which the work is done. The mine owner's duty, with regard to the place of work, differs considerably from that of the proprietor of a department store, for while the business of the former and the method of the work, from their very nature,

¹ *Kentucky Freestone Co. v. McGhee*, 25 Ky. L. R. 2211; 80 S. W. Rep. 1113.

² *Wilson v. Alpine Coal Co.*, 26 Ky. L. R. 337; 81 S. W. Rep. 278.

³ *Banker Hill & Sullivan Mining and Concentrating Co. v. Jones*, 103 Fed. Rep. 813, "In an action for injuries to a servant in a mine from the defective condition of a track, evidence held to show that casual inspection or observation of the track would have disclosed its unballasted condition, and the possible danger to be apprehended therefrom." *Flockhart v. Hocking Coal Co.* (Iowa, 1905), 102 N. W. Rep. 494.

render all places most dangerous, the work of a clerk in an ordinary mercantile business is attendant with but small risk. The employer's duty, therefore, toward his employees, as regards the place of work, bears a close reference to the kind of work performed.¹ The law does not require the mine owner to guarantee his employee a safe place, but only one that is reasonably safe, considering the character of the work and the nature of the business. If the mine owner is guilty of no neglect, but has used ordinary care to safeguard his employee against the hazards of his service, then he has, in legal contemplation, provided a reasonably safe place, regardless of the incidental risks of the business;² but if ordinary care is not used to adopt all the customary precautions to protect the employee from dangers that are not mere incidents of his

¹ *Myers v. Hudson Iron Co.*, 150 Mass. 125; *Coombs v. Cordage Co.*, 102 Mass. 572; *Bailey Mas. Lia. Inj. Serv.*, p. 85; *Buswell Per. Inj.*, Sec. 197, p. 825. "On account of the hazardous nature of mining operations the duty of the employer to furnish a reasonably safe place for the employee to work, is particularly applicable to mines, and the employer is liable to his employee for an injury resulting from the dangerous nature of the place, if he has failed to take proper and reasonable precaution to provide for the safety of the place where the injury occurred." *White Mines & Min. Rem.*, Sec. 448, p. 593; *Lake Superior Co. v. Erickson*, 10 M. M. R. 89; *MacSwinney Mines, etc.*, p. 611; *Hamman v. Coal Co.*, 156 Mo. 234; *Smith v. Coal Co.*, 75 Mo. App. 177; *Wright v. Compton*, 2 M. M. R. 189; *Buswell Per. Inj.* 202. Servant entitled to rely on presumption that master has made place reasonably safe, in absence of notice that it is not safe. *Himrod Coal Co. v. Clark*, 99 Ill. App. 832; 197 Ill. 514. The rule of safe place does not apply where the employee is employed to do work specially hazardous, as to repair known defects. *Wahlquist v. Maple Grove Coal and Mining Co.* (Iowa, 1902), 89 N. W. Rep. 98. But this rule does not preclude recovery by employee, helping to repair roof, where superintendent had failed to provide temporary props. *Idem.*

² *Smith v. Peninsular Co.*, 65 Mich. 507; *Burke v. Witherbee*, 98 N. Y. 562; *Buswell Per. Inj.*, Sec. 197, p. 825. A master cannot delegate duties imposed by law or assumed by contract, and escape liability under the doctrine of fellow-servants. *Spring Valley Coal Co. v. Robizas*, 111 Ill. App. 49.

work, the master would be derelict in his duty, as regards the place of work.¹ The employer, however, does not guarantee the safety of the place where the employee is required to work, nor is he required to keep such place safe at all times;² but the employee assumes such risks as are incidental to the service performed and the master only undertakes that his work shall not be rendered more dangerous than the nature of the service necessitates, through a want of reasonable care on his part.³

§ 40. Same — Duty cannot be delegated — Exceptions. — The duty of the master, as regards the place of work selected for his employees, is personal to the master and cannot be avoided by delegation to another employee.⁴

¹ *Howard Oil Co. v. Davis*, 76 Tex. 639. "It is the duty of a master to exercise reasonable diligence to see that the place at which he puts his servant to work is reasonably safe, and he cannot excuse or exculpate himself by showing that he did not notice any dangers, or that none were obvious to him." *Western Stone Co. v. Muscial*, 96 Ill. App. 288. "A master is bound to provide for his servant a reasonably safe place to work, and is liable for injuries caused by the failure to do so, though such failure may have been due to the negligence of a fellow-servant of the one who was injured." *Southern Bauxite Min. & Mfg. Co. v. Fuller*, 43 S. E. Rep. 64.

² *Buswell Per Inj.*, Sec. 197, p. 325; *Coombs v. Cordage Co.*, 102 Mass. 572; *Sirriagh v. Hilton*, 111 N. Y. 183. The rule as to the duty of the master to provide the employee a safe place to work did not apply to an entry room of a mine, which was constantly being changed by the labor performed. *Heald v. Wallace* (Tenn. 1902), 71 S. W. Rep. 80.

³ *Pa. Coal Co. v. Ne* (Pa.), 13 Atl. Rep. 841; *Giles v. Diamond Iron Co.* (Del.), 8 Atl. Rep. 368; *Armour v. Hahn*, 111 U. S. 440. "An employee ordered to do work has the right to assume that the place is safe, and that there are no other dangers, save such as are obvious and necessary." *Lanza v. Le Grand Quarry Co.* (Iowa, 1904), 100 N. W. Rep. 488.

⁴ *Buswell Per. Inj.*, Sec. 193, p. 311; *White Mines & Min. Rem. Sec.* 896, p. 526; *Sanborn v. Madra Flume &c. Co.*, 70 Cal. 261; *Moynahan v. Hills &c. Co.*, 146 Mass. 586; *Atlantic Coal & Min. Co. v. Leonard*, 126 Ill. 216. "A mine owner cannot avoid liability for the injury of a miner, arising from his failure to perform the absolute duty he owes to employees to make proper inspection, and to provide a reasonably safe

The law places the duty on the mine owner and if it could be avoided by substituting an employee for whose neglect the owner would not be responsible, this would be done in a majority of cases, and on account of the irresponsible character of the employees to whom the duties would be delegated, injuries to employees from such causes would be speedily multiplied and they would in most cases be remediless. But in many of the mining States¹ and in the Federal courts² the ground foreman is held to be a fellow-servant with the laborers in the mine, and where the foreman is held to be a fellow-servant, instead of a vice-principal of the mine owner, the employer is not liable for an injury resulting from his negligence in ordering an employee to work in a dangerous place.³ Nor would the employer be held responsible for an injury to an employee received at a place which had been rendered dangerous by such employee himself, for, in voluntarily assuming the danger and causing the injury he alone would be held to blame.⁴

§ 41. Same. — Where work changes the place. — The well-established doctrine which requires the employer to

place for the miners to work, by delegating such duty to one who is in another respect a fellow-servant of the miner injured." *Bunker Hill & Sullivan Mining & Concentrating Co. v. Jones* (U. S. C. C. A., Or., 1904), 130 Fed. Rep. 813. The fellow-servant doctrine will not permit an employer to avoid liability for duties imposed by law, or those assumed by contract, by delegation to a fellow-servant. *Spring Valley Coal Co. v. Robizas*, 111 Ill. App. 49.

¹ For list of States where employee and foreman are held to be fellow-servants, see *White Mines & Min. Rem.*, Sec. 393, p. 520, and Sec. 453, p. 600.

² *Alaska Min. Co. v. Whalen*, 168 U. S. 85, 88.

³ *Lehigh Valley Co. v. Jones*, 86 Pa. St. 432; *Delaware Canal Co. v. Corral*, 89 Pa. St. 374; *Trihay v. Brooklyn Mining Co.*, 15 Mor. Min. Rep. 535; *Alaska Mining Co. v. Whalen*, 168 U. S. 86.

⁴ *Mooney v. Coal Co.*, 55 Iowa, 671; *Con. Coal Co. v. Lloyd*, 51 Ohio St. 542.

furnish a reasonably safe place for his employees to work, has been held to have no application where the nature of the work performed, and its object, is to continuously change the place.¹ The position of the employee, in such cases, is similar to that of the servant using an appliance or tool that he alone, because of the particular use, must see to the repairs or safety of his implement.² To hold the employer liable in such a case would be to make of him an absolute insurer. Accordingly, where the nature of the work continuously changes the place where the employee works, as the excavation of earth or rock, in a mine, which momentarily changes and increases or lessens the risk of the employee with every stroke of the pick or hammer, the place is one that the employee, himself, must see is reasonably safe, for if, by his own act, the particles that hold the earth or rock in place are broken up and caused to fall according to natural laws, the employee subjecting himself to such a law, as the active means of putting a familiar immutable law in operation, could not look to another for compensation for resulting injuries.³ But if the dangerous nature of the place is due to a defect traceable to the negligence of the master, or one which he could and ought to

¹ "The rule requiring the master to furnish a safe place to work did not apply, as deceased was engaged in making a dangerous place safe." *Indian & C. Coal Co. v. Batey* (Ind. App. 1904), 71 N. E. Rep. 191; *Raiter v. Mining Co.*, 75 N. W. Rep. 219; *Allan v. Logan*, 37 Pac. Rep. 496; *Finalyson v. Utica Mining Co.*, 67 Fed. Rep. 507; *Bradley v. C. & M. Co.*, 138 Mo. 293; *White Mines and Min. Rem.*, Sec. 398, p. 529.

² *Jennings v. Iron Bay Co.*, 47 Minn. 111; 49 N. W. Rep. 685; *Carlson v. Ry. Co.*, 21 Oregon, 450; 28 Pac. Rep. 497.

³ *Aldrich v. Furnace Co.*, 78 Mo. 559; *Bradley v. C. M. Co.*, 138 Mo. 293. This well recognized rule was not followed by the inferior appellate court of Missouri in *Carter v. Baldwin*, 81 S. W. Rep. 204. See, also, *Gilson v. Mining Co.*, 67 Fed. Rep. 507; *Rasmussen v. C., R. I. & P. Co.*, 21 N. W. Rep. 588; *Olsen v. McMullen*, 24 N. W. Rep. 318; *Peterson v. Rushford*, 42 N. W. Rep. 1063; *Swanson v. Lafayette*, 83 N. E. Rep. 1033; *Brown v. Chattanooga Co.*, 77 S. W. Rep. 445; *Anderson v. Minster*, 81 Fed. Rep. 528.

have remedied,¹ or if he was present in person or by representative and directed the work that occasioned the unsafety of the place, then his lack of judgment, instead of that of his employee, would be the cause of the injury and he would be responsible in damages therefor.²

§ 42. **To whom the duty as to a reasonably safe place applies.** — In some cases the duty of furnishing a reasonably safe place is broadly held to apply, as against an employer, to all employees in his service, without regard to the character of the work being done, or other circumstances, having regard to the conditions under which the work is done, or the kind of labor performed.³ This statement of the rule is not accurate, as the person who performs the labor, and the surrounding circumstances and the nature of the work done, are all essential elements to consider, in determining the liability of the employer, for a failure to furnish a reasonably safe place.⁴ While the rule is usually stated to be that the employer is bound to fur-

¹ *Aldrich v. Furnace Co.*, 78 Mo. 559; *Bradley v. C. & M. Co.*, 138 Mo. 293; *Hammon v. Coal & Coke Co.*, 156 Mo. 232.

² As to effect of order by the vice-principal see *Carter v. Baldwin*, 81 S. W. Rep. 204; *Larson v. Mining Co.*, 71 Mo. App. 512. "A mine employee, who observes a crevice in a boulder, and apprehends danger therefrom, and calls the attention of his foreman thereto, has a right to rely upon the superior judgment of the foreman, and on his opinion that it will not fall; and in so doing, and in obeying the foreman's order, he does not, as a matter of law, assume the risk of the danger which he apprehends." *Carter v. Baldwin*, 81 S. W. Rep. 204. "A servant has a right to believe the statement of his boss that the place where his work is performed is safe." *Chicago, W. & V. Coal Co. v. Moran*, 110 Ill. App. 664; judgment affirmed (1904), 71 N. E. Rep. 38; 210 Ill. 9.

³ *Womble v. Merchants &c. Co.*, 135 N. C. 474; 47 S. E. Rep. 493; *Bunker Hill and Sullivan Mining and Concentrating Co. v. Jones*, 130 Fed. Rep. 813.

⁴ *Bunker Hill and Sullivan Mining and Con. Co.*, *supra*; *Robbins v. Big Circle Mining Co.*, 105 Mo. App. 78; 79 S. W. Rep. 480, *Indiana &c. Coal Co. v. Batey* (Ind. App. 1904), 71 N. E. Rep. 191; *Carter v. Baldwin*, 81 S. W. Rep. 204.

nish a place and tools that are reasonably safe for the work of the employee, it is subject to the qualification that the newest or latest tools or appliances or the safest place is not necessary to be furnished, but it is sufficient if such as are in common use are furnished and such as are reasonably safe and proper for the purpose for which they are used.¹ Where the work of the employee is to make a dangerous place safe, the rule requiring a reasonably safe place does not obtain,² and while the rule does not apply as to a trespasser or licensee, if one goes upon the employer's premises to perform work as an employee and not as a mere stranger or licensee, then the owner owes him the duty as to a reasonably safe place, and for an injury from an unsafe place, such a person could recover.³

§ 43. **Illustration of unsafe places in mines.**— As illustrations of a breach of duty, with reference to the place of work, if a mine owner permits an employee to work in ground, known by him to be unsafe;⁴ if he puts his employee at work in

¹ *Marks v. Harriett C. M. Co.*, 135 N. C. 287; 47 S. E. Rep. 432; *Tomkins v. Marine E. & M. Co.* (N. J. 1904) 58 Atl. Rep. 393.

² *Indiana Coal Co. v. Batey*, 71 N. E. Rep. 191.

³ *Williams v. Belmont Coal & Coke Co.* (W. Va. 1904) 46 S. E. Rep. 802. "The rule that a master is not bound to provide and maintain a safe place for his servants to work, where they are creating the place, and when it is constantly being changed in character by their labor, and becomes dangerous solely by their negligence, does not justify a vice-principal in giving false information to plaintiff, a workman in a mine, that an unexploded blast in the mine, which had been left by a former shift of workmen, had been exploded before plaintiff went into the mine at the time he was injured." *Allen v. Bell* (Mont. 1905), 79 Pac. Rep. 582.

⁴ *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Adams v. Min. Co.*, 85 Mo. App. 486.

a drift that he has failed to timber;¹ if he permits infant employees to use a dangerous coal chute,² or has a bulkhead removed, so that a column of earth would fall upon his employee,³ in all these cases the employer would be liable, for a failure to furnish a reasonably safe place for his employee to work. But an employee could not recover for an injury from a falling roof which he had himself failed to trim, in the performance of a duty assigned to him,⁴ nor could he recover for an injury from a falling boulder where he was, himself, the active agency to bring such boulder down.⁵

§ 44. Owner should provide reasonably safe passageways. — The mine owner should provide reasonably safe passageways, in and to the mine, where employees are at work, with reasonably safe approaches thereto and for a failure to so provide such passageways, or to maintain the same in a reasonably safe condition of repair, after constructing them, the owner, in case of a resulting injury to an employee, would be liable in damages.⁶ This duty, like that placed upon the mine owner to provide a reasonably safe place, and, indeed, as a part of the duty in that regard due to the employee, existed at common law, and with reference to passageways, especially, has been the subject of special legislation, in the mining States.⁷ A dark tunnel, leading to a coal mine, used by the owner of the mine for

¹ White Min. & Min. Rem., Sec. 463, p. 611; *Hamman v. Coal & Coke Co.*, 156 Mo. 232; *Fisher v. Lead Co.*, 156 Mo. 479.

² *Va. Coal Co. v. Nee* (Pa.), 13 Atl. Rep. 841.

³ *Gibson Con. Min. Co. v. Sharp*, 38 Pac. Rep. 850.

⁴ *Pittsburg & W. Tool Co. v. Estilwood*, 33 Ohio L. J. 277.

⁵ *Finalyson v. Utica Min. Co.*, 67 Fed. Rep. 507.

⁶ *Garity v. Bullion Beck & Champion Mining Co.*, 27 Utah, 534; 76 Pac. Rep. 556.

⁷ *Junction Mining Co. v. Ench*, 111 Ill. App. 346.

hauling coal through the surface, and by the miners in going to and returning from their places of work, with the knowledge and consent of the mine owner, is held to be just as much a *place*, within the meaning of the rule requiring reasonable care, upon the part of the mine owner, to maintain it in a reasonably safe condition, as any other part of the employer's mine.¹

§ 45. Same — Contributory negligence in use of passageway. — Notwithstanding the mine owner is held to owe to his servants, who are required to pass along a roadway in his mine, the legal duty to maintain the same in a reasonably safe condition,² he would not be liable if the injury to the employee was caused, not by the defective condition of the passageway, but by the contributory negligence of the injured employee himself. And an employee is held precluded, by his contributory negligence, where he attempted to follow a path in the dark and fell into a pit, for this is such recklessness as would work a very great

¹ *Williams v. Belmont Coal & Coke Co.* (W. Va. 1904), 46 S. E. Rep. 802. "In an action for death of a servant employed as a car driver in a mine by the falling of material from the roof of the entry, evidence descriptive of the entry of the mine, and showing how it could have been ascertained whether or not it was unsafe, was admissible." *McFarland's Adm'r v. Harbison & Walker Co.*, (Ky. 1904), 82 S. W. Rep. 430; 26 Ky. Law Rep. 746. "In an action against a mine owner for injuries to a miner alleged to have been caused by failure of defendant to keep the roadway along which plaintiff was required to drive a car in a safe condition, and also requiring plaintiff to drive a vicious mule, evidence held sufficient to support a finding that defendant failed to provide a safe roadway." Judgment, 112 Ill. App. 452, affirmed, *Henrietta Coal Co. v. Campbell*, 71 N. E. Rep. 863; 211 Ill. 216.

² "A mine owner owes to his servants who are required to pass along a roadway in the mine, the legal duty to maintain the same in a reasonably safe condition." *Henrietta Coal Co. v. Campbell* (Ill.), 71 N. E. Rep. 863; 211 Ill. 216.

hardship upon the employer to hold him responsible therefor.¹

' "A miner who had always before been conducted to his place of work by a guide, and who, on a particular occasion, finding that the guide had gone on before, attempted to reach the place alone, though the path was dark, was guilty of contributory negligence as matter of law, and could not recover for injuries sustained by falling into a pit alongside the path." *Smith v. Thomas Iron Co.* (N. Y. Sup. 1903), 54 Atl. Rep. 562. "It is the duty of the owner of a mine to provide reasonably safe passageways and approaches therein, and to exercise ordinary care in keeping them in a reasonably safe condition." *Garity v. Bullion-Beck & Champion Min. Co.* (Utah, 1904), 76 Pac. Rep. 556. "A dark tunnel leading to a coal mine, used by the owner of the mine for hauling coal, and by the miners going to and returning from work with the consent of the owner, is a place in respect to which the owner of the mine owes to his employees the duty of ordinary care." *Williams v. Belmont Coal & Coke Co.* (W. Va. 1904), 45 S. E. Rep. 802.

CHAPTER IV.

PLEADING ACTIONS FOR INJURIES IN MINES.

SECTION 46. Complaint must show relation from which duty would follow.

- 47. Pleading and proof should correspond.
- 48. Petition should show absence of knowledge on plaintiff's part.
- 49. Plaintiff need not, generally, deny negligence.
- 50. Failure to specify duties performed—Motion to make more definite.
- 51. Necessity of pleading contributory negligence and assumed risk.
- 52. Defense of fellow-servant need not be pleaded.
- 53. Pleading negligent order of foreman.
- 54. Pleading superintending power of foreman or vice-principal.
- 55. Illustration—Explosion not alleged to be due to vice-principal's negligence.
- 56. Pleading action for defective scaffold, under statute.
- 57. Pleading failure to give customary warning or notice.
- 58. Pleading injury from handling frozen dynamite.
- 59. Pleading action for willful violation of statute.
- 60. Pleading injury in placing belt on pulley.
- 61. Action for injury from "ways, works and machinery."
- 62. Failure to make roof of drift safe.
- 63. Defective petition under Missouri "Prop statute."
- 64. Pleading failure to inspect and timber, under Illinois law.
- 65. Injury from defective holster ring and coal bucket.
- 66. Injury in use of defective holster rope.
- 67. Joinder of actions for common law and statutory negligence.

§ 46. Complaint must show relation from which duty would follow.—As the basis of the action for personal injuries from negligence, is the violation, by the defendant, of a duty owing to the plaintiff, it is always essential for the petition to allege the facts going to show the rela-

tion of the parties, from which the basic fact of the action would appear, viz., the duty owing to the plaintiff and the consequent negligence, arising from its violation. Unless this relation is shown, as the law would not indulge in the presumption of a violation of duty, but, on the other hand would presume that every one has performed his duty, unless facts showing a violation of duty are set forth, the plaintiff's attitude might well be concluded to be that of a mere licensee or trespasser, to whom the only duty would be not to wantonly injure, after the discovery of the presence of the trespasser, or licensee. In a recent Alabama case, the complaint alleged that the intestate was killed by reason of the negligence of a person in the defendant's service, to whose orders the intestate was bound to conform and did conform and was conforming at the time of his death. No facts going to show the relation of the intestate to the party giving the orders were alleged, and it was held, on demurrer, that no cause of action was alleged, as it was not alleged that deceased was an employee of the defendant, or any facts from which a duty could be predicated.¹

¹ *Logan v. Central Iron & Coal Co.*, 139 Ala. 548; 36 So. Rep. 729. "In an action by a servant to recover for a personal injury alleged to have been caused by the negligence of the master, a paragraph in the complaint stating the bare legal conclusion that it was the duty of the defendant to provide plaintiff with a reasonably safe place to work and to keep the same in a reasonably safe condition, which arises by implication from the facts alleged in other paragraphs, is surplusage, and will be stricken out on motion." *Green v. Indian Gold Min. Co.* (U. S. C. C., Mont., 1903), 120 Fed. Rep. 715. "A petition claiming damages for the negligence of a master, which contains only general allegations of negligence, will be dismissed on a general demurrer, unless amended." *Palmer Brick Co. v. Chenall* (Ga. 1904), 47 S. E. Rep. 829. "A complaint for the wrongful death of a miner, alleging negligence on the part of the mine owner, resulting in decedent's death, decedent's freedom from negligence, and that he did not assume the risk incurred, was sufficient as a common-law complaint." *L. T. Dickason Coal Co. v. Unverferth* (Ind. App. 1903), 66 N. E. Rep. 759.

§ 47. **Pleading and proof should correspond.** — As in other civil actions, it is generally not necessary to allege facts that the plaintiff will not have to prove to establish his cause of action, but only such facts should be alleged as are necessary to prove to make out the plaintiff's case.¹ A "clear and concise statement" of the particular facts upon which the plaintiff relies for a recovery is generally all that is required,² but of course such statement should show the violation of the right on the plaintiff's part; the negligence of the defendant — which may be alleged in general terms, or specifically, as may be desired — and the connection between the injuries and the acts of negligence responsible therefor.³ The cause of the injury, in order that it may appear whether the negligence of the defendant is responsible therefor or not, should be made to appear, as this is the basis of the right of action; the facts bearing upon the nature and extent of the injuries and the elements of damage, ought to be specifically set out, in order to fully advise the defendant of the claims made, and the proof is then limited to the material issues thus framed by the pleadings.⁴ Where the specific cause of the injuries is alleged, no evidence of other causes is permissible,⁵ for the obvious reason that the defendant is not prepared to meet such extraneous issues, so in framing his petition, where negligence in express terms is charged, it is always essential for the plaintiff to be especially careful of the particularization of the acts of negligence, as well as the description of the nature and extent of the injuries received.⁶

¹ 16 Enc. Pl. & Pr., p. 376.

² Bliss Code Pl., Secs. 174–215.

³ 16 Enc. Pl. & Pr., p. 376.

⁴ Bliss Code Pl. (2 Ed.), Sec. 211, §10a.

⁵ *Ante, idem.*

⁶ *Houston v. Traphagen*, 47 N. J. L. 23; 16 N. C. Pl. & Pr., p. 377. A general allegation of negligence is held sufficient in the following min-

§ 48. Petition should show absence of knowledge on plaintiff's part.—In an action by an employee for an injury from the insecure condition of the employer's plant or works, the petition should, generally, present a state of facts which shows an absence of knowledge, on his part, of the dangers and defects complained of, and if the petition discloses a state of facts which might have been known to him, it is demurrable, unless it alleges that it was not known, and thus negatives the assumption of risk by the employee.¹ Where a complaint for an injury from an insecure roof, in a mine, alleged that the ground foreman

ing cases: *Bunnell v. Iron &c. Co.*, 66 Conn. 24; *Senitt v. Chicago &c. Co.*, 57 Mo. App. 223; *Mary Lee Coal Co. v. Chambliss*, 97 Ala. 171; *House v. Meyer*, 100 Cal. 592; *Coal Bluff Mining Co. v. Watts*, 6 Ind. App. 347; *Mississinewa Co. v. Patton*, 129 Ind. 472; *East Tenn. Coal Co. v. Daniel*, 42 S. W. Rep. 1062; *Berns v. Coal Co.*, 27 W. Va. 285; *Scott v. Hogan*, 72 Iowa, 614. But in Oregon, a general averment of negligence is held insufficient. *McPherson v. Pacific &c. Co.*, 20 Oregon, 486.

¹ *Dalton v. Rhode Island Co.*, 25 R. I. 574; 57 Atl. R. p. 373. An action for injuries from a defective scaffold, which omits to negative the plaintiff's knowledge thereof, is bad. *Indiana Natural Gas Co. v. Wells*, 31 Ind. App. 460; 68 N. E. Rep. 319. "A complaint for personal injuries was that plaintiff, 18 years of age, while at work in defendant's steel works, stepped on the edge of an uncovered vat of molten metal to hammer a cog wheel into place, pursuant to defendant's directions, and struck and missed the wheel, and was thus forced to swing around and fall into the metal. The negligence charged was the failure to cover the vat, and to inform plaintiff as to the danger, knowing that he was without experience, and that missing the blow would throw him into the metal; but it was not averred that he did not know for what the vat was used, nor that he looked around to observe it for himself. *Held*, that such averments were not sufficient to bring the case within Employer's Liability Act, § 1, subds. 2, 4 (Burns' Rev. St. 1901, § 7083), imposing a liability for the negligence of other employees." *Corning Steel Co. v. Popholz* (Ind. App. 1902), 64 N. E. Rep. 476. "A declaration by a servant for injuries alleging that on the top of the ledge where plaintiff was working there was a loose stone, liable to fall, and which did fall upon him, and that he did not know that the stone was loose and liable to fall, and could not have known by the exercise of due care, but that defendant possessed such knowledge, is not demurrable as disclosing an obvious danger." *Gince v. Beland* (R. I. 1904), 57 Atl. R. p. 300; 25 R. I. 527. "In an action by a servant against his master for personal injuries, plaintiff must aver and show that he was not aware

of the defendant, for some time had known of the unsafe roof and that the deceased had no knowledge thereof, but that such foreman, prior to his injury, told him of such defective roof and ordered him to make it safe and that while so engaged, the deceased was killed, it was held that as the facts alleged disclosed a knowledge of the defective roof, the additional allegation of a want of such knowledge was unavailing and that the petition did not allege a cause of action.¹

§ 49. Plaintiff need not, generally, deny negligence—**The Iowa rule.** — As a general rule, in most of the States, it is not necessary for the plaintiff to expressly negative the idea that he was guilty of negligence contributing to the injury, for the burden of establishing contributory negligence is held to be on the defendant and it is necessary that he plead this defense to be available to him.² How-

of the danger." *Willie v. East Tennessee Coal Co.* (Ky. 1904), 84 S. W. Rep. 1166; 27 Ky. Law Rep. 335.

¹ *Indiana Coal Co. v. Batey*, 71 N. E. Rep. 191. An allegation that a stone was loose and liable to fall and that defendant knew such fact but plaintiff did not, is not demurrable. *Carter v. Baldwin*, 81 S. W. Rep. 204; *Gince v. Beland*, 25 R. I. 527; 57 Atl. Rep. 300. "In an action for injuries to a servant, an allegation that plaintiff was in the exercise of due care and diligence, and utterly without knowledge or warning of any danger, and without reason to anticipate the same, is not the equivalent of an allegation that plaintiff was not familiar with the way in which the work was done, and that he did not have knowledge of the risks of the business." *Fortin v. Manville Co.* (U. S. C. C. R. I. 1904), 128 Fed. Rep. 642. "In an action for wrongful death, a complaint alleging that the injury to the decedent was caused by the fall of a derrick mast near which he was working, and that the condition of the guy rope, which gave way, causing the fall, was known to defendant, or could have been known to it by a reasonable inspection, and that the decedent had no knowledge of the defect, stated a good cause of action." *Consolidated Stone Co. v. Morgan* (Ind. 1903), 66 N. E. Rep. 696.

² *Atchison v. Wills* (D. C. 1903), 21 App. D. C. 548; *Parkhurst v. Swift*, 81 Ind. App. 521; 68 N. E. Rep. 620; *Chicago & Eastern Ill. Co. v. Stephenson*, 69 N. E. Rep. 270; *Ball v. Gussenhoven*, 29 Mont. 32; 74 Pac. Rep. 871.

ever, in Iowa, it is held that a complaint is insufficient if it fails to negative the fact that the plaintiff was guilty of contributory negligence.¹ This holding seems at variance with two of the well-established rules of pleading, that the plaintiff should not anticipate a defense and need not allege facts that it is necessary for the defendant to affirm and establish, until the defendant first pleads such defense that makes the issue competent, which avoids that defense. But the different holdings on this question, as on many other doctrines of the law, in different jurisdictions, are looked at from entirely opposite viewpoints.

§ 50. **Failure to specify duties performed — Motion to make more definite.** — As a general rule, the complaint should show the character of the duties the plaintiff was performing, at the time of his injury, so as to advise the court and the defendant of the nature and cause of injury. Where a complaint, however, shows on its face that the defendant was guilty of actionable negligence and does not affirmatively show that the plaintiff was guilty of contributory negligence, it is sufficient, as against a motion to compel the plaintiff to make the complaint more definite and certain, by alleging the particular kind of work in which the employee was engaged, at the time of the injury, and the manner in which he was then performing his work,² as it was generally sufficient, in a common law action for negligence, to allege the negligence of the defendant and the injury to the plaintiff as a result thereof, the plaintiff's freedom from negligence and that he did not assume the

¹ *Brown v. Illinois Central Co*, 98 N. W. Rep. 625. "A declaration by a servant for injuries from a dangerous condition which might, as far as the pleading discloses, have been known to him, is demurrable, unless it alleges that it was not known, or states some excuse for continuing work if it was known, and thus negatives assumption of the risk" *Dalton v. Rhode Island Co.*, 57 Atl Rep. 383, 25 R. I. 574.

² *Diamond Block Coal Co. v. Cuthbertson* (Ind. App. 1903) 67 N. E. Rep. 558

risk incurred.¹ A mere general allegation of a neglect in failing to provide a reasonably safe place in which to work, following a paragraph, in which the nature of the injury is described, is held, in Montana, to be so general as to be mere surplusage and should be stricken out, on motion.²

§ 51. **Necessity of pleading contributory negligence and assumed risk.** — Ordinarily it is necessary to plead both assumed risk and contributory negligence as a defense, but an exception to this rule takes place when the evidence offered in behalf of the plaintiff shows such contributory negligence or assumption of risk as will defeat the action. There is no reason why a defense of assumed risk, as well as that of contributory negligence, should not be shown, under a general denial, where the evidence of the plaintiff himself, shows such a defense, and, indeed, this seems to be the well recognized rule.³ This rule is recognized in a recent case in Colorado, where, in an action for injuries to a miner, the plaintiff's evidence showed that he assumed the risk which resulted in his injury, defendant was held entitled to a direction of the verdict, on that ground, although the defense of assumed risk had not been pleaded.⁴ And in a recent Washington case, where

¹ Dickenson Coal Co. v. Unverferth, 30 Ind. App. 346; 66 N. E. Rep. 759.

² Green v. Indian Gold Mining Co., 120 Fed. Rep. 715. It is error to make plaintiff set up just what acts alleged were negligent; what acts were willful and what were done in utter disregard of the rights of the plaintiff and in what particulars the machinery was unsound and unfit for use, in South Carolina. Lynch v. Spartan Mills, 66 S. C. 12; 44 S. E. Rep. 93. "In an action for injuries from being struck by a splinter from a driftpin which was being driven in a boiler, an allegation that the pin was improperly made, so as to be liable to chip, was sufficiently definite; the facts being peculiarly in defendant's possession." Rickaly v. John O'Brien Boiler Works Co. (Mo. App. 1904), 82 S. W. Rep. 968.

³ Schlereth v. R. R., 96 Mo. 509; Epperson v. Postal Tel. & C. Co., 155 Mo. loc. cit. 872.

⁴ Iowa Gold Mining Co. v. Diefenthaler, 76 Pac. Rep. 981.

the evidence showed a state of facts that would preclude the recovery by the plaintiff, on account of his contributory negligence, while the rule was recognized to be, as stated, that it is a defense to be specially pleaded, it was held that the court should not ignore the facts so presented, although introduced by the plaintiff and not by the defendant.¹

§ 52. Defense of fellow-servant need not be pleaded.— Since the plaintiff, in an action for an injury by a vice-principal, is required to allege and prove the relation of vice-principalship,² a mere general denial of the petition would put in issue the fact of the existence of such relation and where this is the ground of negligence counted upon, by the plaintiff, it is not essential to specifically plead the defense of fellow-servant. In other words, it is essential for the plaintiff to both plead and prove that the injury was caused by the act of a superior in command and if he fails to prove this fact, the defendant would be entitled to a demurrer to his evidence, where this practice obtains, at the close of his case, and he would not have to plead the existence of a relation different from that alleged, but can simply put the facts alleged in issue, by a general denial.³

¹ *Bier v. Hosford*, 35 Wash. 544; 77 Pac. Rep. 867. Being in a place where the employee had a right to be, when he has no control over the forces that injure him, but they are controlled by agents of the master, and no act of negligence can be chargeable to him, is not contributory negligence of an employee. *Beresford v. Amer. Coal Co.* (Iowa), 98 N. W. Rep. 902. "A plea in an action for negligent death, alleging that decedent assumed the risk of his injury, in that he had knowledge or notice of the defect by which he was killed, is subject to demurrer, since the averment of knowledge or notice, being in the alternative, is no stronger than an averment of notice and that is not the equivalent of knowledge." *Osborne v. Alabama Steel & Wire Co.* (Ala. 1903), 33 So. Rep. 687.

² *Shaw v. Bambrick-Bates Con. Co.*, 102 Mo. App. 666; 77 S. W. Rep. 96.

³ *Ante, idem.*

And, in Georgia, it is held that a defendant is never under the obligation of especially pleading the defense of fellow-servant, or that the injury was caused by the act of a co-employee;¹ but in Illinois, the defendant is held to assume the burden, where he relies upon such a defense, and must allege and prove that plaintiff was injured by a fellow-servant and not by a superior servant, where this defense is relied upon.²

§ 53. **Pleading negligent order of foreman, or vice-principal.** — As a general rule, while a general allegation of negligence is, in some States, held sufficient,³ where the plaintiff sees fit to specify the acts of negligence, upon which his action is based, he must set up the facts which would constitute such negligence and is limited in the introduction of evidence and also in his recovery, by instruction, to the specific ground of negligence counted upon in his petition.⁴ Accordingly, in a Missouri case, where the ground of negligence alleged was that the defendant had

¹ *Vinson v. Morning News Co.*, 119 Ga. 655; 45 S. E. Rep. 481.

² *Southern Co. v. Stewart*, 108 Ill. App. 652. "In an action for negligent death, the complaint alleged that it was defendant's duty to furnish deceased with a reasonably safe place and tools in and with which to work; that deceased was directed, by an employee of defendant having authority over him, to extract a charge of blasting powder, for which deceased was not skilled, fitted, or employed, and of the danger of which he was ignorant, and in execution of which he was killed. It was further alleged that the death was directly due to the negligence of defendant in failing to provide him with a safe place to work and safe tools, and to employ competent co-employees, and from exposing him to unnecessary danger. *Held*, that such complaint was objectionable, because it affirmatively appeared that the injury was caused by the negligence of a fellow-servant, who was not shown to be a vice-principal." *State v. Schwind Quarry Co.* (Md. 1903), 55 Atl. Rep. 866.

³ In *Moore v. Catawba Power Co.* (68 S. C. 201; 46 S. E. Rep. 1004), a petition alleging defective appliances was held not subject to a motion to make more definite by specifying the defects.

⁴ *Bohn v. Ry. Co.*, 106 Mo. 534.

negligently failed to provide a safe and proper tool, the instrument provided being a stick of pine lumber, instead of a crow bar, and it was attempted to prove under this allegation of negligence, a specific negligent order of the foreman to use such tool, the Supreme Court held such evidence incompetent for the reason that no such negligence was counted upon in the petition.¹

§ 54. Pleading superintending power of foreman or vice-principal. — Where the negligence counted upon in a

¹ In this case, the Supreme Court, speaking through Judge Black, said: "The plaintiff's case, if any he has, must stand upon the ground that the defendant, by and through its foreman, negligently ordered too much force to be applied to the lever, or negligently ordered plaintiff to take an unsafe position. *No such case is made by the pleadings* and we do not stop to discuss questions which may arise on such issues of fact." *Bohn v. C. R. I. & P. Co.*, 106 Mo. loc. cit. 434. In *Mace v. Ashland Coal & Iron Co.* (82 S. W. Rep. 612), an allegation of negligent order, without a further showing that it was within the line of the foreman's duty, is bad. "Where the declaration avers that the injury was caused by the failure to give 'necessary and suitable orders,' evidence of the giving of negligent or improper orders cannot be received." *Sanks v. Chicago & A. R. Co.*, 112 Ill. App. 883. "Under an allegation, in a declaration in an action by a servant against a master for personal injuries, that plaintiff was in the exercise of due care, evidence that plaintiff had been directed to do the work he was attempting to do in the manner in which he attempted to do it at the time of the injury was admissible though there was no averment of a specific order of direction." Judgment, 112 Ill. App. 452, affirmed. *Henrietta Coal Co. v. Campbell*, 71 N. E. Rep. 863; 211 Ill. 216. A complaint which alleges the employment of a third person by the defendant, with power of supervision and control; that at the time of the injury the plaintiff was obeying an order given by such person so intrusted with power of control and that such order was a negligent order and the plaintiff, in obedience thereto, was injured, alleges a good cause of action. *Indiana Co. v. Buskirk*, 82 Ind. App. 414; 78 N. E. Rep. 925. But a petition which simply charges that plaintiff was injured by the negligence of another employee, while acting under his order, and that plaintiff was bound to conform to his orders, who was his superior in charge of the work, is insufficient under the Alabama statute, in failing to show that the order was within the powers of supervision of the employee giving it. *Southern Foundry Co. v. Bartlett*, 137 Ala. 284; 34 So. Rep. 20.

suit for personal injuries is the negligence of a foreman or vice-principal, the facts showing the superintending control or vice-principalship on the part of the negligent servant must generally be set forth, for otherwise the relation would be presumed to be that of fellow-servants, as all engaged in the same employment, at common law, were held to be fellow-servants, and the grades of service, as affecting the liability of the employer, had no place or recognition in the courts.¹ Accordingly, in Wisconsin, it is held that a mere allegation that the negligent employee was an agent and manager, of the defendant, was held to be insufficient, in the absence of an allegation showing the duties of the negligent employee, from which a presumption could be indulged that he was also a vice-principal, or representative of the employer.² A similar allegation,

¹ "If the declaration seeks to charge the employer with the negligence of other servants, it will be insufficient, even after verdict, if it does not allege that such other servants were not fellow-servants with the plaintiff. If a recovery is sought on this basis, facts should be stated sufficient to show that such servants were not fellow-servants with the plaintiff. The rule is that a recovery cannot be had for an injury resulting from the negligence of a co-employee, unless the complaint states facts sufficient to take the case out of the general rule." 18 Enc. Pl. and Pr., pp. 907, 908 and cases cited; *Pittsburg Coal Co. v. Peterson*, 186 Ind. 898. And manifestly, this is the correct rule. At common law all employees were fellow-servants, regardless of the station of the servants, and the master was not liable for the negligent acts of any of them. If a liability is predicated upon the act of a servant, therefore, by a fellow-servant, the facts sufficient to justify the conclusion that his acts were an exception to the general rule, should be alleged, or no liability is shown. And, as stated above, the rule is that a failure to set forth such facts, is not even cured by verdict. See recent opinion Judge Reyburn, in *Shaw v. Bambrick Con. Co.*, 77 S. W. Rep. 96.

² "An allegation that the injuries were caused to the plaintiff through the negligence of one who was the agent and manager of the company's office, in the city where plaintiff was employed, does not in the absence of further allegations, showing the duties of such agent, create the presumption that he was a vice-principal, for whose negligent acts resulting in injuries to the employee, the company would be liable." *Dwyer v. Amer. Express Co.*, 55 Wis. 548.

in an Alabama case, was held insufficient, where no facts were alleged from which the superintendence of the negligent employee could be presumed,¹ and this is the general rule upon the subject. But a general allegation of superintendence is generally all that is required, without a specification of the duties of the vice-principal, and where a petition alleged that the negligent employee was defendant's "superintendent, having full charge and control of the work, in and about the quarry," the complaint was held not objectionable, on the ground that the negligence alleged was that of a fellow-servant.²

§ 55. **Illustration — Explosion, not alleged to be due to vice-principal's negligence.** — Illustrative of the rule laid down in the preceding sections, is a recent case in Maryland, an action for negligent death, wherein the complaint alleged that "it was the defendant's duty to furnish the plaintiff with a reasonably safe place and tools in and with which to work; that deceased was directed, *by an employee of the defendant, having authority over him*, to extract a charge of blasting powder, for which service deceased was not skilled, fitted or employed and of the

¹ "So, an averment that plaintiff was injured by the negligence of defendant's yard-master, is insufficient, unless it is further shown that such yard-master is intrusted with superintendence." *L. & N. Ry. Co. v. Bouldin*, 110 Ala. 815.

² *Southern Indiana Co. v. Moore*, 71 N. E. Rep. 516. In an action by an employee for personal injuries resulting from the negligence or incompetency of a vice-principal, it need not be alleged that such person was vice-principal, or that his incompetency was known to the principal, to let in proof that the injury occurred by the negligence or incompetency of such vice-principal. *Harris v. Balfour Quarry Co.* (N. Y. 1904), 49 S. E. Rep. 95. The sufficiency of the evidence to establish the authority of one employee to direct another, when the facts do not necessitate the legal conclusion of such authority, is for the jury. *Texas & Pacific Coal Co. v. Manning*, 78 S. W. Rep. 545.

danger of which he was ignorant'' and in the execution of which order he was killed. It was further set up that the death was directly due to the negligence of the defendant, in failing to provide him with a safe place to work and with safe tools with which to work and to employ competent employees and from exposing him to unnecessary danger. The court held that the complaint failed to allege a cause of action, because it affirmatively appeared that the injury was due to the negligence of a fellow-servant, who was not shown to be a vice-principal.¹

§ 56. **Pleading action from defective scaffold, under statute.** — Where an action is instituted for an injury occurring by reason of a defect in an appliance required to be up to a certain standard, by a statute, the plaintiff must, generally, allege all the facts that are necessary to show a breach of the statutory duty, occurring prior to the injury complained of, or no sufficient cause of action will be alleged.² Where, however, certain prerequisites to a liability under the statute are omitted from the complaint, the petition may still allege a good cause of action, at common law, although held bad, for a cause of action arising under the statute, if the petition contains all the essentials of a good cause of action at common law. This rule is illustrated by a recent case in New York, where an action was given for the negligence of a superintendent, on the giving of notice to the employer. No notice was given in the action, but as the facts alleged showed that the death of the decedent was caused by the negligence of the employer, in the erection of a scaffold, and the complaint alleged a good cause of action, at common law, it was

¹ *State v. Schwind Quarry Co.*, 55 Atl. Rep. 866.

² *Crosby v. Lehigh Valley Company*, 128 Fed. Rep. 193.

held unnecessary to give notice, as a condition precedent to the common law liability.¹

§ 57. **Pleading failure to give customary warning or notice.** — Where it has been the custom to give warning or notice of the starting of dangerous machinery, or the setting off of blasts, or other dangerous acts, of which employees would generally require warning, such custom should be set forth with particularity, as well as the collateral facts, which go to show the necessity of such a custom, or otherwise the petition will be too indefinite or vague to constitute a good cause of action. Accordingly, where the declaration alleged that it was the custom in the operation of temporary elevators, where employees were at work near the wells, to give notice when such elevators were about to be operated, so that persons working near could avoid being struck by such elevators, which notice it was the defendant's duty, under the circumstances, to give, it was held that these allegations were too vague and indefinite to show a custom of sufficient force to bind the defendant.²

¹ *Gmaehle v. Rosenberg*, 178 N. Y. 147; 70 N. E. Rep. 411. "Where in an action for injuries to a servant, the complaint alleged that the injury occurred because of the weak scaffolding constructed by defendant's superintendent to support certain pipe, by the fall of which plaintiff was injured, and that such insecure blocking was known to defendant's superintendent and unknown to plaintiff, and was the cause of the injury, and that the scaffolding was constructed under defendant's immediate supervision, the complaint was not objectionable on the ground that it disclosed an obvious defect on an ordinarily careful observation, but sufficiently stated a cause of action." *Indiana Natural Gas & Oil Co. v. Vauble* (Ind. App. 1903), 68 N. E. Rep. 195.

² *Durell v. Hartwell, Williams & Kingston*, 26 R. I. 125; 58 Atl. Rep. 448. "Where plaintiff alleged that he was injured by being put at work by defendant without warning as to the danger of the employment, but his evidence tended to show that any cause of action that he might have was based on the defective appliances, a nonsuit was properly granted." *Moyer v. Ramsay-Brisbane Stone Co.* (Ga. 1904), 46 S. E.

§ 58. **Pleading injury from handling frozen dynamite.**—If a petition for an injury from an explosion received while thawing out frozen dynamite, alleges the parties and the jurisdiction of the court; the fact of plaintiff's employment by the defendant and that while so engaged he was obeying an order to load a hole with frozen dynamite and that the dynamite caught fire and exploded, taking off the plaintiff's arms; that the plaintiff's actions were in pursuance to the defendant's orders, which were negligent, and that the plaintiff himself was without fault, it alleges a sufficient cause of action, both in form and substance, to permit an amendment, by specifying the negligence, and, when so amended, the complaint would allege a good cause of action.¹

§ 59. **Pleading action for willful violation of statute.**—Where the cause of action counted upon in the petition, is under a statute where the element of willfulness is essential to constitute a violation of the statute, then the pleader, both in drawing his petition and in introducing his evidence, should bear this element in mind and both a known violation of the statute should be alleged and an intentional refusal to comply with the terms of the statute should be established.² Under the Illinois statute, for failure to provide timbers and props, an intentional or known violation of the statute is held to be a willful violation, within

Rep. 844. "Where plaintiff alleged that he was caused to jump from an incline, and sustained the injury sued for, by a sudden warning, either maliciously or mischievously uttered by defendant's servant, when there was no danger or cause for alarm, but it was not alleged that the warning was in any way connected with the servant's duty to defendant, or that he represented defendant in any manner therein, the petition did not state a cause of action against defendant." *Mace v. Ashland Coal & Iron Ry. Co.* (Ky. 1904), 82 S. W. Rep. 612.

¹ *Columbia Mining Co. v. Wellmaker*, 118 Ga. 606; 45 S. E. Rep. 455.

² *Leslie v. Rich Hill Coal Mining Co.*, 110 Mo. 31; *Hawley v. Dailey*, 18 Bradw. 391; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590.

the rule, requiring the element of willfulness to be pleaded.¹ The same is true of the Missouri prop statute² and under the Illinois statute against the employment of children in mines, a willful violation of the statute is sufficiently set forth, where it is alleged that plaintiff is under fourteen and the defendant, with full knowledge of that fact, wrongfully and unlawfully employed him.³

§ 60. **Pleading injury in placing belt on pulley.** — In a Georgia case the plaintiff alleged that he was engaged to and did work upon a particular machine, in the defendant's service; that there was another machine near which he worked, on which he was not engaged to work and that he was ordered to work upon this machine and that it was defective and dangerous, but not alleging in what the defect or danger consisted and that while obeying the order, as he was directed, he attempted to replace, with a file, a belt, which had slipped off of a pulley, no other means being furnished him for the purpose. It was held the petition was insufficient to state a cause of action, as it failed to show the negligence counted upon and did not allege a good cause of action.⁴

¹ *Niantic Coal Mining Co. v. Leonard*, 126 Ill. 216; *Beard v. Skeldon*, 113 Ill. 584; *Wesley C. C. Co. v. Healer*, 84 Ill. 128.

² *Leslie v. Rich Hill Coal Mining Co.*, *supra*.

³ *Marquette Third Vein Coal Co. v. Dielle*, 208 Ill. 116; 70 N. E. Rep. 17.

⁴ *Ballew v. Breach*, (Ga. 1904), 49 S. E. Rep. 297. In *Wetjen v. Southern White Lead Co.* (5 Mo. App. 598), the plaintiff attempted to replace a belt by the use of his hand, instead of a stick, provided for the purpose, and this was held to preclude his recovery, on account of his own negligence in thus selecting the more dangerous way to perform his work. "The paragraph of a complaint in an action against a master for the death of a servant which alleged that a belt was defective and that it had been broken twice during the day of the accident, and prior thereto and on days before the accident, of which the master had full knowledge, and of which insufficiency and breaking the servant had no knowledge, was defective for failing to aver that the use of the defective belt was dangerous or its use negligent." *Norton-Reed Stone Co. v. Steele* (Ind. App. 1903), 69 N. E. Rep. 198.

§ 61. **Action for injury from "ways, works, machinery," under Alabama statute.**—Under the Alabama Code,¹ providing that when an injury is caused by any defect in the "ways, works, machinery, or plant connected with or used in the business of the employer," the latter shall be liable the same as though the employee were a stranger, a complaint for injuries from the fall of a derrick, which alleged defects to the metal rods and strips, by which it was held in position, and that the wall, to which the derrick was fastened, was not sufficiently strong to support the same and that such defects had not been discovered, owing to the defendant's negligence, was held to be sufficient and not subject to the objection that it was too indefinite with reference to the negligence charged.²

§ 62. **Failure to make roof of drift safe.**—As to parties competent to sue for common law negligence, or the breach of a duty owing by virtue of the common law, a failure to keep the roof of a drift in a reasonably safe condition, as a result of which an employee is injured, will, generally, justify a cause of action for breach of the common law duty to provide a reasonably safe place for the employee, and this, whether the dangerous nature of the roof arises from a failure to trim it, or a failure to furnish props when needed.³ But where the right of the plaintiff

¹ Alabama Code, 1896, Sec. 1749.

² Southern Foundry Co. v. Jennings, 137 Ala. 247; 34 So. Rep. 1002.

³ White Mines & Min. Rem., Sec. 463 and cases cited. "The declaration in an action for negligently causing the death of plaintiff's intestate alleged the wrongful neglect of defendant in failing to keep the roof of a part of its mine in a reasonably safe condition, by propping or otherwise; that defendant had knowledge of the lack of props and the consequent dangerous condition of the roof; and that deceased was killed by a falling of a portion thereof. Held, that the failure to provide a safe place to work was sufficiently alleged to support a judgment for plaintiff, and that the complaint was not fatally objectionable as being grounded on the mere failure to prop the roof of a mine, which alone was not an actionable breach of duty." Himrod Coal Co. v. Clark, 64 N. E. Rep. 282; 197 Ill. 514.

to sue obtains only by reason of a special statute — as where the plaintiff is the parent of an adult child, who, in Missouri, would only be competent to sue for a failure to furnish props — then the plaintiff must bring himself within the letter of the statute, and the right to sue being dependent upon the statutory conditions specified, the safety of the roof, if those conditions are not alleged to exist, would be wholly immaterial.¹

§ 63. **Defective petition under Missouri “Prop” Statute.** — Under the Missouri “Prop Statute,”² providing that the “owner, agent or operator of any mine, shall keep a sufficient supply of timber, when required to be used as props, so that the workmen may, at all times, be able to secure the said workings from caving in” and making it the duty of the “owner, agent or operator to send down all such props, when required,” the petition to recover for the death of a miner, killed by reason of a violation of the statute, must allege every fact necessary to bring the case within the statute, the action being purely statutory and in derogation of the common law.³ Accordingly, a petition which alleges, generally, that the defendant was negligent in failing to timber the mine and that he failed to use care in timbering the same and which wholly fails to allege that he did not “keep a sufficient supply of timber, when required to be used as props” and that he failed to “send down all such props, when required,” is insufficient to state a cause of action.⁴

§ 64. **Pleading failure to inspect and timber under Illinois law.** — A complaint for personal injuries, under the Illinois statute, which alleged that the defendant was engaged in mining coal and neglected to employ a compe-

¹ *Cole v. Mayne*, 122 Fed. Rep. 836.

² Revised Statutes of Missouri, 1899, Sec. 8822.

³ *Cole v. Mayne*, 122 Fed. Rep. 836.

⁴ *Cole v. Mayne*, *supra*.

tent mine boss and that the mine boss did not examine every working place in the mine every alternate day, and failed to see that the working places were properly secured, by props, and failed to have a sufficient supply of props on hand, sufficiently showed that the defendant failed to perform the duties enjoined upon him by the statute, of having the working places properly inspected on every alternate day and of properly supporting the roof to keep it from falling and of furnishing a sufficient supply of props.¹

§ 65. **Injury from defective hoister ring and coal bucket.** — In an Indiana case, the plaintiff alleged that he was working at the bottom of a shaft, in the defendant's service, and was injured by the overturning of a bucket, used to hoist earth and rock, caused by the defective condition of an iron ring, used with the bucket. It was alleged that the ring was cracked and too weak to withstand the strain required of it and that the plaintiff, owing to the semi-darkness, was unable to inspect the ring closely, but believed it to be sufficient. It was held that the complaint was sufficient; that the facts set forth did not show that the defect was obvious and as apparent to the plaintiff as to the defendant and that the demurrer to the petition should be overruled.²

§ 66. **For injury in use of defective hoister rope.** — In a recent Indiana case, for injuries to an employee in a stone quarry, it was alleged, in the complaint, that the defendant negligently used a hoister rope in the derrick

¹ *Diamond Block Coal Co. v. Cuthbertson*, 57 N. E. Rep. 558.

² *Brazil Block Coal Co. v. Gibson*, 66 N.E. Rep. 882. "In an action for personal injuries, the complaint alleged that, while plaintiff was working in a shaft pursuant to orders, an iron bucket gave way, through imperfect appliances and gross carelessness of defendant and his agents, and fell on plaintiff, injuring him. *Held* to state a cause of action." *Murphy v. Hopper* (N. Y. 1902), 78 N. Y. S. 657; 75 App. Div. 606.

where the plaintiff was at work, which was old and unfit for use and was too short and was not properly fastened and that, by reason of these defects, it gave way, falling upon the plaintiff, as a result of which he sustained the injuries complained of. It was held that the petition alleged, with sufficient definiteness, that the injury was due to the neglect of the defendant and the cause of action was sustained, as alleged.¹

§ 67. **Joinder of actions for common law and statutory negligence.** — Actions for negligence at common law and under a statute should not be joined in the same count, as this would be a wrongful commingling of different causes of action in the same count,² but there is no objection to the joinder in the same petition, in different counts, of actions for violations of statute and also for violations of a duty owing under the common law.³ In a late Illinois case, where the plaintiff sued for a violation of the statute preventing the employment of children, under the age of fourteen years, and making the defendant liable for a willful violation of the statute, and also for damages for an injury due to the negligence of the defendant, in separate counts, it was held permissible pleading, as both counts were based upon the same state of facts and there was no rule of pleading which prevented the joinder in the same action, of such causes, in different counts in the same petition.⁴

¹ *Clear Creek Stone Co. v. Dearmin*, 66 N. E. Rep. 609. "In an action for injuries to a servant, it was alleged in the complaint that defendant negligently used a hoisting rope in the derrick where plaintiff was at work which was old and unfit for use, too short, and not properly fastened, and that by reason of these defects it gave way, falling on plaintiff. *Held*, that the complaint sufficiently showed defendant's negligence to have been the proximate cause of the injury." *Clear Creek Stone Co. v. Dearmin* (Ind. 1903), 66 N. E. Rep. 609.

² *Jackson v. M., K. & T. Co.* (Texas), 78 S. W. Rep. 724; *Baker v. McDaniel*, 178 Mo. 447; 77 S. W. Rep. 531.

³ *Marquette Third Vein Co. v. Dielle*, 208 Ill. 116; 70 N. E. Rep. 17.

⁴ *Marquette Third Vein Co. v. Dielle*, *supra*.

CHAPTER V.

EVIDENCE IN MINING ACCIDENT CASES.

- SECTION** 68. Injury must be connected with negligent act.
69. Plaintiff must establish relation of employer and employee.
70. Proof of defendant's knowledge of defects.
71. Notice of defects sufficient to charge employer.
72. Evidence of plaintiff's ignorance of danger.
73. Evidence that appliances or place were reasonably safe sufficient.
74. When employee's reputation for care is admissible.
75. Burden of establishing relation of vice-principalship.
76. In Illinois defendant must prove relation of fellow-servants.
77. Evidence that plaintiff acted upon a negligent order.
78. Burden of proving assumed risk and contributory negligence.
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80. Evidence of conditions before and after injury.
81. Evidence of custom in other mines.
82. Opinion evidence as to safety of methods.
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85. Doctrine *Res ipsa loquitur*.
86. What evidence of necessity for timbering sufficient.
87. Evidence of competency of defendant's employees.
88. What sufficient evidence of failure to give warning.
89. Evidence of enforcement of rule.
90. Reasonableness and sufficiency of rule.
91. What evidence of willfulness sufficient.
92. What evidence of willful disregard of rule sufficient.
93. Employment of child, in violation of statute.
94. Defective holster rope — Contributory negligence.
95. Negligence in drilling into unexploded blast.
96. Death from suffocation — Combustible material.
97. Proving notice of injury, when required by statute.
98. Failure to furnish screen for furnace, negligence, when.
99. Evidence that defendant insured incompetent.
100. Variance — Proof must correspond with pleading.

§ 68. Injury must be connected with negligent act. — It is not sufficient to simply allege facts showing the negligence of the employer, together with facts showing the nature and extent of the injury to the plaintiff, but a connection must be shown between the negligent act complained of and the injury resulting to the plaintiff, or in other words, it must be shown that the negligence of the defendant was the approximate cause of the injury. Where a petition for the death of an employee in a stone quarry alleged that a guy rope to a derrick was so low as to catch on the rock loaded upon a tram car and throw it off on employees and for this reason a position behind the car was a dangerous position, of which the defendant had notice, and that while deceased was behind said car the defendant suddenly slackened the rope and a large rock was thereby thrown upon the deceased killing him, but it was not alleged that the lowness of the rope, resulting from the negligent causes alleged, was the cause of the injury to the plaintiff, the petition was held bad, on demurrer.¹

§ 69. Plaintiff must establish relation of employer and employee. — The plaintiff, as a part of his case, must generally establish the relation from which the defendant's duty toward him, with reference to the given appliance or place, where the injury was sustained, would be implied, as matter of law. It is usually requisite that the relation of employer and employee be shown to exist, unless it is

¹ Consolidated Stone Co. v. Staggs (Ind. App. 1904), 71 N. E. Rep. 161. "Under Civ. Code, Ga. 1895, § 2612, in an action against the master for injuries to the servant, it is necessary, not only to show negligence on the part of a master, but due care on the part of the servant, and that the servant did not know, and had not equal means of knowing, of that which is charged as negligence to the master, and by the exercise of ordinary care could not have known thereof." Ludd v. Wilkins (Ga. 1908), 45 S. E. Rep. 429.

admitted by the pleadings.¹ It is not essential, however, that this should appear by direct evidence, but is sufficient, if from all the circumstances, a finding that such a relation existed, could be reasonably supported by the evidence and where it is established that plaintiff performed work and labor, in the defendant's mine, and that this was done with the implied consent of the defendant and that the injury was received while engaged in entering the mine, this will be held sufficient, from which the law will imply a duty to furnish him a reasonably safe place and appliances to perform his work, within the rule applying to master and servant and to preclude the contention that the plaintiff was but a trespasser or licensee.²

§ 70. **Proof of defendant's knowledge of defects.** — It is usually not only essential to prove the defects in the defendant's plant or appliances, which occasioned the injury to the plaintiff, but it is also essential to prove that the defendant had knowledge of such defect, or that it had existed for a sufficient length of time to charge him with notice thereof, before the plaintiff is entitled to recover. In an Iowa case, where the allegation of negligence was that the defendant failed to trim or timber the roof and permitted it to become dangerous, the mere proof that the roof would get dangerous in from three to six days after it became loose, unaccompanied by any evidence as to when the defect was discovered by the defendant, was held to be insufficient to make out a case.³

§ 71. **Notice of defects sufficient to charge employer.** — As a general rule, the employer is not liable for an injury

¹ *Vallie v. Hall*, 184 Ma-s. 358; 68 N. E. Rep. 829; *Henderson v. Kansas City*, 177 Mo. 477; 76 S. W. Rep. 1045.

² *Ringue v. Oregon Coal &c. Co.*, 75 Pac. Rep. 703.

³ *Thayer v. Smoky Hollow Coal Co.*, 98 N. W. Rep. 718.

from a defect in his mine or machinery, unless he had actual notice thereof, or it had existed for a length of time sufficient to charge him, in law, with notice of such defect.¹ The law, however, will imply and infer notice on the part of the employer of any defects in his mine or its ways, works or machinery, which by the exercise of ordinary care he might have discovered and after he has, or should have, notice of a defect, and the consequent prospective danger to any of his employees, who are or are liable to be employed in the vicinity of such defect or danger, he must repair it and make the surroundings reasonably safe, considering the services to be rendered and the nature of the use to which the place or appliance is put, and for a failure so to do, in case of a resulting injury, he would be liable.² And notice of a defective condition to the mine manager or foreman, or to an inspector, appointed by the mine owner and acting for him, in the discharge of his duty of inspection, or to either of them, would, generally, be held to be notice to the employer himself.³

§ 72. Evidence of plaintiff's ignorance of danger. — It is not essential to the plaintiff's recovery in an action for personal injuries, that he should conclusively establish his ignorance of a given defect or the resulting danger therefrom,⁴ but the defense of assumed risk, to prevail

¹ This is the general rule as to liability of all employers. *Glasscock v. Swofford Bros. Co.*, 106 Mo. App. 656; 80 S. W. Rep. 864; *Hester v. Packing Co.*, 84 Mo. App. 454; *Breen v. Cooperage Co.*, 50 Mo. App. 202; *Burnes v. Railway*, 129 Mo. 41; *O'Malley v. R. R. Co.*, 113 Mo. 329.

² *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185.

³ *Riverton Coal Co. v. Shepard*, 111 Ill. App. 294. Under an allegation of notice on defendant's part, of the frozen, dangerous condition of giant powder, constructive notice may be proven. *Currell v. Jackson*, 77 Conn. 115; 58 Atl. Rep. 762.

⁴ *Hamman v. Central Coal & Coke Co.*, 156 Mo. 282; *Hamilton v. Coal Co.*, 108 Mo. 864.

upon the part of the employer, can only exist, where he was not only aware of the defect which occasioned his injury, but also with the danger resulting therefrom.¹ But if the danger from the use of a given appliance was so obvious, or patent, as to constitute contributory negligence, on the part of an employee, to continue the use of such appliance, then his knowledge of such defect and the resulting danger which would be imputed to him in law from such knowledge would prevent his recovery. Generally, however, when an employee discovers a danger in his surroundings, or the appliances furnished him for use, he is only bound to notice and consider it with reference to his personal safety, while engaged in the present duties of his employment. If, in his opinion, or as a matter of fact, the presence of danger would be suggested by the appearances, to an ordinary mind, he should give notice of the danger to his employer and, failing so to do, after full knowledge of the danger, he could not recover.²

§ 73. **Evidence that appliances or place were reasonably safe, sufficient.** — As a general rule, since the employer is only responsible for a failure to exercise reasonable care and caution to keep his appliances or place of work in a reasonably safe condition, evidence on his part that his appliances were such as were customarily in use by reasonably careful and prudent men in the same business, or that they were reasonably safe, is held competent.³ Evidence, however, that a mine entry was in a "fair condition," means nothing, so far as this issue is concerned and does not show the exercise of a reasonable care and caution on

¹ *Cole v. St. Louis &c. Co.*, 188 Mo. 81; 81 S. W. Rep. 1138.

² *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185.

³ *Pence v. California Mining Co.*, 27 Utah, 878; 75 Pac. Rep. 934; *Bohn v. C., R. I. & P. Co.*, 106 Mo. 429; *Dolan v. Boots &c. Mills*, 185 Mass. 576; 70 N. E. Rep. 1025.

the part of the mine owner to keep it in a "reasonably safe condition."¹ Where the appliances or place are in a reasonably safe condition, however, and it appears that the employer is conducting his business in the customary way, then an injury is ordinarily traceable to the contributory negligence of the employee himself and if his negligence alone could have produced the injury, or the employer's conduct was such that no negligence could be predicated on any act of his, then the employee cannot recover.²

§ 74. When evidence of employee's reputation for care is admissible. — Whenever the ground of negligence declared upon is the employment by the employer of an incompetent and unskillful employee, the general reputation of the given employee, whose character is attacked, is material to the controversy, not only as affecting the good faith and care of the employer in engaging him, but also upon the issue of his competency or ability to discharge the duties intrusted to his care by the employer.³ A given employee, when his reputation is attacked for competency, is also held entitled to give evidence of a general custom on the part of competent and skilled men in his business,⁴ but further than this evidence of reputation is not, generally, held to be relevant to the issue, in an action for negligence. However, in exceptional cases, such as where the facts are not susceptible of more direct proof, as in a case where both an engineer and his fireman were killed in an explosion and more direct proof of his care and prudence was not to be had, upon the occasion in controversy,

¹ *Junction Mining Co. v. Ench*, 111 Ill. App. 346.

² *Plato v. International Silver Co.*, 129 Fed. Rep. 652; *Parotte v. Holbrook et al.*, 127 Fed. Rep. 1018.

³ *Havens v. Rhode Island Company*, 26 R. I. 48; 58 Atl. Rep. 247.

⁴ *International & Grt. North. Co. v. Penn.* (Tex. Civ. App. 1904), 79 S. W. Rep. 624.

it was held competent to establish his general reputation as a "sober, careful and competent engineer."¹

§ 75. **Burden of establishing relation of vice-principalship.** — Since all co-employees, at common-law, were presumed to be fellow-servants, when engaged in the same general service, regardless of the grade of the employee,² this relation is presumed to be the same in actions under the code and the burden is generally regarded as being upon the party who alleges an absence of that relation, to establish it by a preponderance of the evidence.³ A mere allegation that the employee whose act occasioned the injury sued for was the vice-principal of the plaintiff will not justify a recovery by merely establishing the injury, but the power of supervision and the acts from which the vice-principalship, in law, would follow as a necessary conclusion therefrom, must be established by the plaintiff before he can recover upon such an allegation of negligence.⁴

§ 76. **In Illinois defendant must prove relation of fellow-servants.** — Although at common-law the relation of all co-employees was presumed to be that of fellow, and not

¹ *Illinois Central Co. v. Prickett*, 210 Ill. 140; 109 Ill. App. 468; 71 N. E. Rep. 485. "Questions as to the duties of a pit boss as to inspecting the working places; as to keeping the chutes clear of coal; as to timbering or fixing the bulkheads for the purpose of keeping rocks from falling through the chutes; in relation to repairing defects when complained of; as to whether or not, when chutes become clogged or blocked, it is extrahazardous to start or unblock them; and as to whether there was general complaint among the miners of insufficiency of timbers,—are competent on the question of the incompetency of the pit boss." *Green v. Western American Co.* (Wash 1902), 70 Pac. Rep. 810.

² *Cooley Torts*, p. 640.

³ *Shaw v. Bambrick-Bates Co.*, 102 Mo. App. 666; 77 S. W. Rep. 96.

⁴ *Shaw v. Bambrick-Bates Co.*, *supra*. "The burden of proof is on a servant to show by a preponderance of the evidence the master's negligence." *Boyd v. Blumenthal* (Del. 1902), 52 Atl. Rep. 880.

- superior or inferior employees,¹ and the general rule is that the burden of establishing an absence of that relation is upon the party who alleges that the relation of fellow-servants does not exist,² it is held, in Illinois, that the burden of establishing that the plaintiff, at the time of his injury, was a fellow-servant with the employee causing his injury is upon the defendant.³ This holding seems not only counter to the rule that the plaintiff must show the relation of vice-principalship, both by his pleading and
- proof, in order to recover upon this ground of negligence, but also at variance with the rule that a party is never bound to establish a negative proposition, when the existence of a state of facts alleged by the opposite party is essential to a recovery.⁴

§ 77. Evidence that plaintiff acted upon a negligent order.— Where the allegation of negligence, upon the part of an employer, is that he caused, or gave, a negligent order to the plaintiff, upon which he was acting, at the time of the injury, in order to justify a recovery, upon this ground of negligence, it must appear, from the evidence, that the plaintiff was acting in pursuance of such negligent order, at the time of the injury.⁵ Unless a negligent order of the defendant, or a vice-principal, is counted upon in the petition, no evidence of an injury while obeying such an order, would be competent, as this would be a material variance

¹ Cooley Torts, p. 640.

² Shaw v. Bambrick-Bates Con. Co., 102 Mo. App. 666; 77 S. W. Rep. 96; Vinson v. Morning News Co., 118 Ga. 655; 45 S. E. Rep. 481.

³ Southern Co. v. Stewart, 108 Ill. App. 652.

⁴ Bliss Code Pl., Sec. 102, *et sub.* In a recent Kansas case, an instruction which placed the burden of establishing that plaintiff was injured by the negligence of a fellow-servant on defendant was held proper. Con. Kansas City Smelting and Refining Co. v. Osborne, 66 Kan. 398; 71 Pac. Rep. 888.

⁵ Bohn v. Chicago & Alton Co., 106 Mo. 484.

from the ground of negligence alleged and the defendant might not be at all prepared to disprove such an allegation, unless it was set forth in the petition.¹ Proof that a party, injured in a mine, proceeded to the shaft to give an order, but that he did not so proceed, by reason of any direction from the superintendent, will not sustain a recovery under a petition alleging that the superintendent gave him an order to do what he did, at the time.²

§ 78. **Burden of proving assumed risk and contributory negligence.**— While, in an action for personal injuries to a servant, the burden of proving that the defendant was negligent and that the injury to the plaintiff was caused by such negligence, is generally upon the plaintiff, the burden of proof is upon the defendant to show that the injury to the plaintiff was due to his contributory negligence, or that he assumed the risk of the injury, when entering into the contract of employment with the master.³ Where the evidence of the plaintiff, however, establishes the defense of assumed risk, or that of contributory negli-

¹ *Bohn v. Chicago & Alton Co.*, *supra*.

² *Cardiff Coal Co. v. Waybright*, 108 Ill. App. 561. In an action for injuries to a minor, under the age of 14 years, in Illinois, evidence that the defendant's manager some months prior to action, had ordered the injured minor out of the mine, because he was under age, is inadmissible. *Marquette Third Vein Co. v. Dielle*, 208 Ill. 116; 70 N. E. Rep. 17. "In an action by a servant for personal injuries sustained while working at the bottom of a quarry under the express order of defendant's foreman, evidence of the duties of the foreman, and of the relations existing between the servant and foreman, and the extent that the servant was subject to the foreman's order, was admissible. Judgment (1901) 96 Ill. App. 288, affirmed." *Western Stone Co. v. Muscial*, 63 N. E. Rep. 664; 196 Ill. 882. Under a declaration in an action by a servant against the master for personal injuries, evidence that the servant was acting under a specific order at the time he was injured held admissible. *Henrietta Coal Co. v. Campbell* (Ill.), 71 N. E. Rep. 863.

³ *Nord v. Boston & M. Consolidated Copper & Silver Mining Co.* (Mont. 1904), 75 Pac. Rep. 681.

gence, then the defendant is entitled to a direction of the verdict, although neither of these defenses was especially pleaded, for the court should not ignore the fact thus presented, although established by the plaintiff himself and not by the defendant.¹

§ 79. **Evidence of prior negligent acts on plaintiff's part.** — Where the defense to an action by an employee is the contributory negligence of the plaintiff, evidence on the part of the defendant, of previous negligent acts, on the plaintiff's part, is held admissible as going to throw light upon the transaction in issue, in determining whether or not the plaintiff was negligent in doing the act which occasioned the injury.² The rule, however, would be limited to evidence of acts, upon the part of the plaintiff, and not conclusions that a witness might draw from such acts, with reference to the negligence or care that given acts would evidence. This would be a question for the triers of the facts to pass upon, after hearing the facts, for conclusions, except by experts, are never allowed in evidence.

§ 80. **Evidence of conditions before and after injury.** — As a general rule, evidence of the condition of

¹ *Iowa Gold Mining Co. v. Diefenthaler*, 76 Pac. Rep. 981; *Bier v. Hosford*, 85 Wash. 544; 77 Pac. Rep. 267; *Epperson v. Postal Tel. & Co.*, 155 Mo. l. c. 372. "In determining whether an employee, in doing dangerous work at his master's express order, acted as an ordinarily prudent man, so as not to assume the risk, the conduct of other men employed with him at the time is properly taken into account." *Illinois Steel Co. v. Ryska*, 65 N. E. Rep. 734; 200 Ill. 280.

² *Coleman v. Mechanics Iron Co.*, 2 Amer. Neg. Rep. 374. Evidence of custom on the part of careful employees is sometimes admissible. *International & G. N. Co. v. Penn* (Tex. Civ. App. 1904), 79 S.W. Rep. 624. Evidence of a prior accident, from the same cause, was held inadmissible in *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563; 74 Pac. Rep. 147.

premises before an injury, if they are the same at the date of the injury, is admissible, but evidence of the condition of the place where the injury occurred, subsequent to the injury, is not, generally, admissible, as the plaintiff's right to recover depends upon the condition at the time of the injury complained of and the subsequent condition is not material to the issues in the case. Where the ground of negligence complained of was a defective condition of the slope of the shaft and a jerking of the cable, which condition had existed a sufficient length of time for the defendant to have had knowledge thereof, it was permitted a witness to state the condition prior to the injury, although he was not present at the date of the injury in question.¹ And where it was alleged that at the time of the injury there was no plank at a place where it was necessary that one should be kept, the evidence of a witness that he noticed a plank there about three hours after the accident, was held competent, as it was also shown that no change in the conditions had occurred up to the time such plank was seen by him, and subsequent to the injury to the plaintiff.²

¹ *Johnson v. Union Pacific Coal Co. (Utah)*, 76 Pac. Rep. 1089.

² *Meyers v. Highland Boy Gold Mining Co. (Utah)*, 77 Pac. Rep. 748. But injuries to others, before or after an injury to the plaintiff, is not admissible. *Goble v. Kansas City*, 148 Mo. 470; 50 S. W. Rep. 84. Where defendant denies control of the instrument or appliance causing the injury, evidence that a few hours after the injury, he repaired it, is admissible. *Rusher v. Aurora*, 71 Mo. App. 418. "In an action for the death of a servant owing to the fall of a derrick, a photograph taken a few days after the accident, showing workmen actually at work repairing the derrick, was introduced in evidence without objection, and a witness then testified that the morning after the accident he visited the place where the derrick was, and saw workmen handling the ties on which the rails had rested to which the derrick had been clamped, and that they were so decayed that when the men carried them away and threw them down some of them broke. It was plaintiff's theory that the accident had been caused by the decayed ties. *Held*, that the mere fact that the witness stated facts from which the jury might infer that repairs were

§ 81. **Evidence of custom in other mines.**— Since the defendant is only required to exercise such a degree of care, in the conduct of his business, as ordinarily prudent persons in the same kind of business in the same locality are accustomed to exercise, proof of the custom in other well regulated mines is usually held to be competent, upon the issue of the defendant's negligence.¹ In Utah, in an action by an inexperienced miner for injuries, it was held competent to introduce evidence as to the custom in the State and at the defendant's mine, as to requiring an old miner to work with one of no experience² and this, without proof of the existence of such custom for a sufficient length of time to constitute it a common law custom.³ But the evidence of customary acts on the part of other companies, generally must be limited to the custom among well regulated and ordinarily prudent companies, to be admissible,⁴ and the witness must qualify by showing a familiarity with

being made did not render the evidence inadmissible." *Dyas v. Southern Pac. Co.* (Cal. 1903), 73 Pac. Rep. 972. "In an action for injuries to a servant, where plaintiff testified that there was no plank at a place where it was necessary that there should be one, testimony that about three hours after the accident an employee noticed that there was a plank there, where it appeared that no one was working at or about the place in the meantime, and it was not shown that there was any change from the conditions existing at the time of the accident, was competent, as showing that shortly after the accident the same conditions existed." *Meyers v. Highland Boy Gold Min. Co.* (Utah, 1904), 77 Pac. Rep. 347. Where the issue was as to the sufficiency of a hoister bucket, evidence that on prior occasions, in being hoisted, it would strike the sides of the shaft, is competent. *Brazil Block Coal Co. v. Gibson*, 66 N. E. Rep. 882. And, to same effect, see *Revollinsky v. Adams Coal Co.*, 95 N. W. Rep. 122.

¹ *Bohn v. C. R. I. & P. Co.*, 106 Mo. 429.

² *Pence v. California Mining Co.*, 27 Utah, 378; 75 Pac. Rep. 934.

³ For full discussion of Common Law and Mining Customs and Rules, and the evidence by which same are established, see *White Mines & Mining Remedies*, Secs. 69, 90, pp. 100 to 116.

⁴ *Illinois Central Co. v. Prickett*, 210 Ill. 140; 109 Ill. App. 468; 71 N. E. Rep. 435.

the given custom, aside from a knowledge at a few given plants or mills, for otherwise he is not prepared to testify as to the general custom extant in a given locality.¹

§ 82. **Opinion evidence as to safety of methods.** — As a general rule, comparisons in tools, or methods, between those in use by the defendant, at the time of an injury to an employee, and those which the expert witnesses may deem the safest tools in use, is incompetent and prejudicial evidence, as this is a matter for the jury to pass on, after hearing the evidence of the witnesses, as to the safety or defects in the peculiar tools or appliances or methods in use.² In Utah, in an action for injuries from being struck

¹ *Dolan v. Boot &c. Mills*, 185 Mass. 576; 70 N. E. Rep. 1025; *Gamel &c. Co. v. Monfort* (Texas), 81 S. W. Rep. 1029. Evidence by a witness that he had noticed one mill where the gearing was boxed in, was held error, in *Marks v. Harriett Mills*, 185 N. C. 287; 47 S. E. Rep. 432. "In an action to recover for injuries to a servant, proof of custom is evidence as to whether the act of the master in selecting and furnishing appliances for the use of his servant was negligent." *Anderson v. Fielding* (Minn. 1904), 99 N. W. Rep. 857. "Where, in an action for injuries to a driller employed in a stone quarry owing to an explosion of dynamite while he was trying to load a hole for a blast, he testifies that the 'drillers' were accustomed to load holes, and then testifies on cross-examination that they only loaded them 'occasionally,' his testimony is of little force to prove a custom on the part of the drillers to load holes for blasts." *Kopf v. Monroe Stone Co.* (Mich. 1903), 95 N. W. Rep. 72; 10 Detroit Leg. N. 185. A custom on the part of drillmen to load drill holes, is not established by evidence that they "occasionally" did so. *Kopf v. Monroe Stone Co.*, 95 N. W. Rep. 72. "Evidence in an action by a coal mine driver for injuries from an overhanging rock, as to a custom in that mining district respecting the height and width of entries, is admissible." *Hamilton v. Mendota Coal & Mining Co.* (Iowa, 1903), 94 N. W. Rep. 282.

² *Nash v. Dowling*, 93 Mo. App. 156. "In an action by an employee to recover for injuries resulting from being struck by a rail which fell from a car on which it and others were being sent to the bottom of a mine shaft, where plaintiff was working, where the relative safety of different methods used in letting the cars down into the shaft was not an issue, opinion evidence concerning the relative safety of methods was inadmissible." *Johnson v. Union Pac. Coal Co.* (Utah, 1904), 76 Pac. Rep. 1089.

by a rail, being sent down into a mine, opinion evidence as to the relative safety of divers methods for sending down rails into a mine, was held inadmissible.¹ And in Indiana, where the action was for an injury from the falling of a rick of pig iron, comparisons of the rick which fell and produced the injury with others, which had not fallen, was held inadmissible.²

§ 83. What promises exempt servant—Common tools.— For a promise to repair to exempt an employee from assumption of the risk of the business, the promise must be one upon which he relied and continued in the business upon the strength of its being fulfilled, for otherwise he will be held to have assumed the risk, notwithstanding a promise to substitute or repair a given tool. Where the master directs the performance of a given duty and the servant objects and the master either tells him to do the work or quit the service, this is no assurance of the sufficiency of the appliances or a promise of safety, in any sense, nor would the youth or inexperience of the employee, in such

¹ *Johnson v. Union Pacific Coal Co.*, 76 Pac. Rep. 1089.

² *Avery v. Nordyke & Marmou Co.*, 70 N. E. Rep. 888. In an action for an injury from a defective hoisting apparatus an opinion of a witness as to whether such an injury could have resulted from a properly constructed appliance, is held to be incompetent, in *Luman v. Golden Ancient Channel Mining Co.*, 140 Cal. 700; 74 Pac. Rep. 807. "In an action for the death of a servant, while engaged as a switchman in the yards of a blast furnace company, owing to defendant's alleged negligence in not keeping its tracks in repair, the tracks being used only for the purpose of conveying molten metal from the furnace to the slag pile, it was error to permit a witness to testify that he was familiar with the tracks of well-regulated railroads, and that defendant's tracks were not like the tracks of well-regulated roads." *Sloss-Sheffield Steel & Iron Co. v. Mobley* (Ala. 1904), 36 So. Rep. 181. Expert witnesses, familiar with the appliances to which the injury is charged to have occurred, may give their opinions based on their own actual knowledge of the condition of the appliance. They are not confined entirely to hypothetical questions. *Kaminski v. Tudor Iron Works*, 167 Mo. 462.

a case, render the employer liable.¹ Nor would a promise to repair exempt the servant from the assumption of risk, as to a tool, or appliance with which he was perfectly familiar, but as to ordinary common labor, with which he is as familiar as the employer, a promise to make the appliances safer is no exemption from the rule of the assumption of risk, on the part of the servant. Accordingly, a promise to a coal hauler that a wagon pin would be repaired, was held not to exempt him from an assumption of risk, from a continuance to use such an ordinary common tool;² a promise to sharpen a dull punch, where the exact condition of the punch is known and appreciated, is held not to exempt the servant from the responsibility from a continuance to use it,³ and this is the general rule as to common labor or ordinary tools, with which a full knowledge is shown, on the part of the employee.⁴

§ 84. Accident — What evidence of sufficient. — An employee injured as a result of an accident, which is generally defined to be an unforeseen occurrence,⁵ cannot recover from the employer for such injury.⁶ The Supreme Court of Missouri has held that to be an accident, which one ordinarily skillful in the business, could not have foreseen or had no reasonable apprehension would

¹ *Leltner v. Grieb*, 104 Mo. App. 173.

² *Baumwald v. Trenkman*, 88 N. Y. S. 182.

³ *Equitable Powder Co. v. Greene*, 109 Ill. App. 403.

⁴ *McCormick Harvester Co. v. Wojciechowski*, 111 Ill. App. 641. But if the tool is not one that threatens immediate danger or is one with which the employee is not entirely familiar, — in this case an ordinary sledge hammer — he will not be held to have assumed the risk by its continued use. This opinion is by the Kansas City Court of Appeals. *Robbins v. Big Circle Mining Co.*, 105 Mo. App. 78; 79 S. W. Rep. 480.

⁵ *Joyce Dam.*, Secs. 69, 70; *Black's Law and Prac. in Acc. Cas.*, Sec. 29; *Watson Dam. Per. Inj.*, p. 33; *Labatt Mas. & Serv.*, Sec. 820.

⁶ *Ante, idem.*

occur.¹ Generally, if an employer is pursuing his usual and customary course, in the conduct of his business, and the plaintiff is injured by an unusual occurrence, but such unusual occurrence is not inferentially the result of an unusual act of the defendant, then the injury to the plaintiff is ordinarily held to be due to an accident and the defendant is not responsible therefor.²

§ 85. **Doctrine res ipsa loquitur.** — The application of the principle *res ipsa loquitur*, depends upon the particular facts of each case. The principle does not apply to every case of injury, but only to those where mere occurrence implies, in the law, a breach of duty.³ The legal presumption of negligence is conditioned on the absence of other evidence of negligence, not on the absence of proper averments of negligence, in the petition. A party may take advantage of the rule *res ipsa loquitur* even though his pleading sets out the facts of the negligence complained of, provided such facts are the ones which the legal inference of negligence fairly tends to establish, but there must always be something which tends to show some neglect, or omission of duty, as the approximate cause of the injury.⁴ The mere fact of an injury, under circum-

¹ "An accident, which an experienced man in that business could not, with ordinary care, have foreseen or guarded against, is a hazard incident to the business, which every man engaged in it assumes for himself." *Beasley v. Transfer Co.*, 148 Mo. 413.

² *Young v. Missouri Pacific Co.*, 68 Mo. App. loc. cit. 275; *Brewing Assn. v. Talbott*, 141 Mo. 674; *Higgins v. R. R.*, 73 Ga. 149; *Lafin v. R. R.*, 106 N. Y. 136. "The mere occurrence of an accident causing injury to an employee does not raise even a prima facie presumption that the master has been guilty of negligence or a breach of duty." *Moore Lime Co. v. Johnson's Adm'r*, 48 S. E. Rep. (Va. 1904) 557.

³ *Gallagher v. Edison Co.*, 72 Mo. App. 576.

⁴ *Gallagher v. Edison Co.*, *supra*. "The maxim '*res ipsa loquitur*' is applicable under certain circumstances in suits by the servant against his master for damages from the latter's negligence." *Palmer Brick Co. v. Chenall* (Ga. 1904), 47 S. E. Rep. 329.

stances which would not raise a presumption that it was caused by the defendant's negligence is insufficient;¹ nor would the mere fact of an injury caused by the falling or breaking of machinery, which the defendant was operating, raise such a presumption;² but where, from the peculiar facts of the case, the falling of the machinery would raise a presumption of negligence, or could be caused only by a breach of duty, on the defendant's part,³ or where, from the facts proven, it is apparent that the injury was caused by an adequate cause, and that this cause was the defendant's negligence, as where the facts showed an injury from a falling timber, properly placed against an immovable upright, since it would not fall without some adequate cause and the facts lead to the irresistible conclusion that this cause was the defendant's negligence, the defendant was held liable, under the principle *res ipsa loquitur*.⁴

§ 86. What evidence of necessity for timbering sufficient. — Just to what extent or how far it is necessary to go

¹ *Carvin v. St. Louis*, 151 Mo. 334; 32 S. W. Rep. 210.

² The mere fact of the absence of a part of a machine, with proof of an injury to a person using it in that condition, does not sustain the allegation that the injury was caused by the absence of the detached portion of the machine. *Plefka v. Knapp, Stout & Co.*, 145 Mo. 316.

³ *Gallagher v. Edison Co.*, 72 Mo. App. 576.

⁴ *Sakewitz v. American Mfg. Co.*, 78 Mo. App. 144. "In an action to recover for the death of an employee killed by the caving in of a mine, in which there is no question of contributory negligence or the negligence of a fellow-servant but the right to recover depends solely on the negligence of defendant, the burden of proof on such issue rests on the plaintiff, and the fact of the cave-in itself carries no presumption of negligence." *Mountain Copper Co. v. Van Buren* (U. S. C. C. A., Cal., 1903), 123 Fed. Rep. 61. The cave-in of a mine, without more, does not show a case of negligence against the defendant, as the rule *res ipsa loquitur* would not apply to such an injury, as the cave-in may have been caused by natural causes, without the intervention of any neglect by the defendant. *Mountain Copper Co. v. Van Buren*, 123 Fed. Rep. 61.

into the question of the necessity for timbering in a mine, depends upon the question of whether the action is under the terms of a particular statute, and, if so, the language of that statute, or whether it is based upon the common law breach of duty in this regard. If brought under the terms of a statute, the evidence must bring the plaintiff's case within the purview of the statute and if an element of willfulness is essential under the statute, it must appear that there was a knowledge on the part of the employer of the necessity for timbers or props, for otherwise, there could be no intentional, or willful violation of the statute.¹ Whenever the statute in its terms does not define the degree of care, on the employer's part, necessary to constitute a compliance therewith, then the measure of his care would depend upon the common law rule and if he failed to furnish timber, when it was reasonably necessary, he would be guilty of a breach of duty. This is the construction given to the Ohio prop statute² and also to the statute of Missouri, by the Appellate Court of the State,³ and the Federal court has held under the California statute that where the evidence showed that the timbering in a copper mine did not reach to the roof, or back to the stope, and several hours before the plaintiff's intestate was killed that small pieces of rock would fall from the roof, this was held sufficient

¹ *Leslie v. Rich Hill Coal Mining Co.*, 110 Mo. 31.

² *Cecil v. American Sheet Steel Co.*, 129 Fed. Rep. 542.

³ *Weston v. Lackawana Mining Co.*, 105 Mo. App. 702; *Bowerman v. Lackawana Mining Co.*, 98 Mo. App. 308. For a recent criticism of this construction of the Missouri Prop statute, by the Kansas City Court of Appeals and holding a *demand* for props a necessary prerequisite to a liability, see Judge Gantt's opinion in *Wojtylak v. Kansas & Texas Coal Co.* (Mo. Sup. Ct. March, 1905), 87 S. W. Rep. 506. In *McDaniels v. Royle Mining Co.* (85 S. W. Rep. 679), the Kansas City Court of Appeals hold that under the Missouri prop statute, a mining company is liable, where a cave-in results and timbers were not furnished, the evidence of a necessity for the timbers being shown by the cave-in solely.

evidence of a necessity therefor and failure to furnish timbers, to justify a submission of the case, upon this issue, to the jury.¹

§ 87. **Evidence of competency of defendant's employees.** — Where the allegation of negligence in the petition, is a failure to employ competent or skilled employees, any evidence on the part of the defendant, which would counter this charge of negligence, or go to show the competency or skill of the servants of the defendant, would be within the issues framed by the pleadings and it would be error to exclude such evidence on the trial of the case. In a late Virginia case, the allegation of the negligence counted upon by the plaintiff, was, "the carelessness, negligence, incapacity and want of skill on the part of the defendants, their agents and employees who had charge of the quarry and works of the defendants." Counsel for the defendant asked the question: "Did you assign to the steel gang, any but experienced men?" and, on the court's refusal to permit the defendant's superintendent to answer this question, it was held to be reversible error by the appellate court, as the evidence elicited by the question squarely met the charge of negligence counted upon by the plaintiff.²

¹ "The testimony of a number of witnesses that the timbering in a copper mine did not reach to the roof, or back of the stope, by several feet, and that for several hours before the caving in of the roof, by which plaintiff's intestate, working in the mine, was killed, pieces of rock kept falling from the roof upon and through the timbers, was sufficient to authorize the submission to the jury of the question of the negligence of the defendant mining company in failing to keep the mine properly timbered." *Mountain Cooper Co. v. Van Buren*, 188 Fed. Rep. 1.

² *Lane Bros. & Co. v. Bauserman* (Va. 1904), 48 S. E. Rep. 857. It would seem, however, that this question, in its form, was objectionable as asking for a conclusion rather than facts and that the better practice would have been for the counsel to ask the names of the men employed and then establish their competency. In the form the question was put,

§ 88. **What sufficient evidence of failure to give warning.** — As a general rule a warning is only required as to inexperienced servants, where the employer knows of such inexperience, when they are engaged in such hazardous duties as would lead the employer, as a reasonable man, to believe that a warning was due to such an employee to prevent injury to him, in the discharge of his duties.¹ Where an inexperienced employee was under the direction of a man of more experience, who was teaching him the

it would seem the objection thereto, if made for that reason, ought to have been sustained. "The burden of proving negligence in selecting or continuing an unfit servant is upon the plaintiff." *Big Stone Gap Iron Co. v. Ketron* (Va. 1903), 45 S. E. Rep. 740. "In showing the incompetency of a servant, and also the knowledge of the master of such incompetency, evidence that a number of men refused to work with him was admissible." *Giordano v. Brandywine Granite Co.* (Del. 1901), 52 Atl. Rep. 832. "In an action by a servant for personal injuries, the presumption is that the master exercised proper care in the selection of servants, and if this plaintiff claims that his fellow-servants were incompetent he must prove it." *Klos v. Hudson River Ore & Iron Co.* (N. Y. Sup. 1902), 79 N. Y. S. 156. "In an action against the master for an accident caused by a fellow-servant, the master was not compelled to show the cause of the accident, or that it was not caused by himself or any person in his employ." *Giordano v. Brandywine Granite Co.* (Del. 1901), 52 Atl. Rep. 832. "A master is presumed to have known in regard to the incompetency of a fellow-servant what was generally known by those among whom such servant worked and lived, and what he might have known by the exercise of due care and diligence." *Giordano v. Brandywine Granite Co.*, 52 Atl. Rep. 832. "In an action by a miner to recover for injuries resulting from falling rocks in the mine on the ground that the mine owner had failed to furnish necessary timber to support the walls and roof, and that an incompetent pit boss was employed, the question: What is a jump? whether in the geological change from a horizontal to an almost perpendicular, near where the coal is pinched out and reaches the gravel, there is a changed condition from hard to soft? whether there would be a similarity between the coal formation near such point and that at a distance therefrom? and what changes the condition of coal near the gravel or near a vault? — are competent." *Green v. Western American Co.* (Wash. 1902), 70 Pac. Rep. 810.

¹ *Mitchell v. Chicago &c. Co.* (Mo. App. 1904), 88 S. W. Rep. 289.

duties of his employment and the proper way to discharge such duties, so as to avoid injury, an order to oil machinery, without informing or warning the inexperienced and ignorant employee of the proximity of uncovered gearing and cog wheels, into which he was liable to catch his feet in stepping off the ladder, as he could not see them on account of the darkness, is negligence sufficient to warrant a recovery, for an injury from getting his feet hurt, while such inexperienced employee was executing the order given him by the employee of superior experience and training.¹

¹ *Shickle-Harrison and Howard Iron Co. v. Beck*, 212 Ill. 268; 72 N. E. Rep. 423. "A servant employed in hauling cars loaded with coal, running on rails in a coal mine, who knew the way to be dangerous at some point in its course, but who relied on an assurance given him by a fellow-servant that the latter would go with him and show him the danger and what to do, and proceeded, assumed the risk whether the fellow-servant went with him or not, though it was the duty of the master to warn him of the dangers of the way." *Collingwood v. Illinois & I. Fuel Co.* (Iowa, 1904), 101 N. W. Rep. 283. "In an action for injuries to a servant by the explosion of a tube, evidence that defendant's witness conducting an experiment in the premises had given no warning to plaintiff or other employees of the perils of the work in which witness was engaging was admissible." *Cameron v. B. Roth Tool Co.* (Mo. App. 1904), 83 S. W. Rep. 279. "The defense of a fellow-servant is not available where one engaged in a quarry in breaking stone is injured through failure of the superintendent to give or provide for the giving of a warning when rocks were rolled down." *Turrentine v. Wellington* (N. C. 1904), 48 S. E. Rep. 689. "An inexperienced person going to work in a mine assumes only the ordinary risks incident to his employment, and, where he has nothing to do with the timbering of the mine, he has the right to assume that it is properly done by his employer, unless advised to the contrary, or the danger is obvious." *Mountain Copper Co. v. VanBuren*, 183 Fed. Rep. 1. "Where an employee is sent into a place provided by the master, where discovery of a defect is difficult, he has a right to assume, in the absence of any circumstances creating a doubt in his mind, that his safety has been reasonably provided for." *Clark v. Wolverine Portland Cement Co.* (Mich. 1904), 101 N. W. Rep. 845; 11 Detroit Leg. N. 723. "The measure of the master's duty to watch and protect his servant from the dangers incident to his employment must be determined from the circumstances of each case,

§ 89. Evidence of enforcement of rule.—It is not sufficient for the master to simply make and promulgate a given rule, with reference to the work of his employees, or the management of the different departments of his busi-

including the experience or lack of experience of the servant. It is true the master is under no duty to warn a servant of dangers which are obvious and apparent to one of ordinary intelligence, but in determining what dangers are obvious and apparent, the experience or lack of experience of the servant must be considered." *Shickle-Harrison & Howard Iron Co. v. Beck*, 112 Ill. App. 444. In the following cases the evidence was held to show negligence in failing to give warning. An employee erecting a fence, as to the danger of being shot by an adverse occupant. *Baxter v. Roberts*, 44 Cal. 188; 18 Amer. Rep. 160. The fact that the labor performed was in violation of an injunction. *Finney v. St. Paul M. & M. Co.*, 48 Minn. 496; 47 N. W. Rep. 78. An inexperienced employee of the danger of operating cars upon a steep tramway. *Alabama Coal & Coke Co. v. Pitts*, 98 Ala. 185; 13 So. Rep. 285. An inexperienced employee of the danger of blasting loosening the rocks of the pillars and roofs of drifts. *Jones v. Florence Mining Co.*, 66 Wis. 268; 57 Am. Rep. 269; 28 N. W. Rep. 207. A blacksmith's apprentice of the danger of gases bursting the bellows. *Reisert v. Williams*, 51 Mo. App. 13. The danger to an inexperienced youth from cog wheels and gearing. *Rannell v. Dilworth P. & Co.*, 131 Pa. 509; 19 Atl. Rep. 845. The danger of molten iron or hot slag exploding when brought in contact with water, in any form. *McGowan v. LaPlata Min. & Smelting Co.*, 3 McCreary, 393; 9 Fed. Rep. 861; *Holland v. Coal &c. Co.*, 90 Ala. 444; 12 L. R. A. 232; 8 So. Rep. 524; *Rebick v. Lake Superior Smelting Co.*, 123 Mich. 406; 48 L. R. A. 649; 82 N. W. Rep. 279; *Redmond v. Butler*, 168 Mass. 367; 47 N. E. Rep. 108; *Hill v. Meyer. Bros. Drug Co.*, 140 Mo. 433; 41 S. W. Rep. 909; *Hunt v. Desloge Lead Co.* (Mo. App. 1904), 79 S. W. Rep. 710. The danger of handling dynamite to an inexperienced employee. *Mather v. Rillston*, 156 U. S. 891; 39 L. Ed. 464; 15 Sup. Ct. Rep. 464; *Bertha Zinc Co. v. Martin*, 93 Va. 791; 22 S. E. Rep. 569; *Loprano v. N. Y. & Ind. D. Co.*, 55 Hun, 452; 8 N. Y. Supp. 717; *Grimaldi v. Lane*, 117 Mass. 565; 59 N. E. Rep. 451; *Burke v. Andersen*, 69 Fed. Rep. 814; 84 U. S. App. 132; 16 Clr. Ct. App. 442; *Myeberg v. B. & S. M. R. Co.*, 25 Wash. 364; 65 Pac. Rep. 539. The danger to an inexperienced employee of falling in a lime kiln with the rock when it subsides. *Parkhurst v. Johnson*, 50 Mich. 70; 45 Amer. Rep. 28; 15 N. W. Rep. 107. The danger to an inexperienced laborer of the falling of a perpendicular bank of earth. *Daly v. Kiel*, 106 La. 170; 30 So. Rep. 254; *Quigley v. Bambrick*, 58 Mo. App. 192.

ness, but he must also see to it that such rule is enforced, for if he fails to enforce the rule it is the same as though no rule at all is made or promulgated and for an injury from the violation of a rule, if the master has not seen to the enforcement of the rule, he has waived the provisions thereof, so far as an insistence upon a compliance therewith by the employee is concerned, and the rule that he had abandoned, would not furnish the master a defense to the action of his employee, injured by reason of a failure to comply therewith.¹

§ 90. **Reasonableness and sufficiency of rule.** — Like a custom that is unreasonable or opposed to common right, which the courts will always hold void, in law,² a rule of an employer, to be upheld by the courts, must be reasonable in its application to the business of the employer and not calculated, in its enforcement, to deprive the employees of any substantial rights.³ In Illinois, in a recent case, a rule was held to be unreasonable, in forbidding miners from leaving their work, at a particular portion of the mine, at a stated hour, for any reason whatever. As applied to the case before the court, it was held that such a rule was contrary to the statute in preventing the employee from leaving the mine when he had been prevented from

¹ *Johnson v. Union Pacific Coal Co.* (Utah, 1904), 76 Pac. Rep. 1089. "Where, in an action for injuries to a miner, negligence was alleged, in that defendant failed to promulgate and enforce a rule that the trap-doors at the top of the shaft should be closed when the hoist bucket was being unloaded at that place, evidence of defendant's son that the superintendent of the mine was directed to instruct the employees that such doors should be closed at such times, offered in support of the testimony of plaintiff's fellow-servant, who alone testified that instructions concerning the closing of such doors had been actually given to the employees, is inadmissible, as being of a self-serving character." *Weeks v. Scharer* (U. S. C. C. A., Colo. 1904), 129 Fed. Rep. 338.

² *White Mines & Mining Rem.*, Sec. 72, and cases cited.

³ *Mellors v. Shaw*, 9 Mor. Min. Rep. 678.

doing further work.¹ Whether a given rule is, or is not reasonable and intelligent, is a question of law for the court; but the application of a given rule to the duty performed by an employee, where such question is in doubt, is an issue of fact, for the jury to pass upon.²

§ 91. **What evidence of willfulness sufficient.** — It frequently happens that in order for a plaintiff to recover for injuries in a mine for the violation of the provisions of a statute applying to the facts in the case, that it is essential to show a “willful” violation of the statutes by the employer, in order to have any standing under the terms of the statute.³ The “Prop Statute,” of Missouri, of 1881, and the Coal Mine Act of Illinois, of 1899, require a “willful” violation of the terms of the statute, to entitle an injured miner to recover damages thereunder.⁴ “Willful” in these acts is held to be used in the sense of “designed” or “intentional,”⁵ and in order to recover it is generally essential for the miner to show an intentional violation of the statute.⁶ However, no more technical meaning is given the word “willful,” as used in the statute than an “inten-

¹ *Junction Mining Co. v. Ench*, 111 Ill. App. 346.

² *LeDuc v. North Pac. Co.* (Minn. 1904), 100 N. W. Rep. 108.

³ This is the case, under the Missouri “Prop Statute,” as construed by the Supreme Court, in 1892. *Leslie v. Rich Hill Coal Mining Co.*, 110 Mo., page 39, construing Sections 14 and 16, Act March 23, 1881. As construed by the Kansas City Court of Appeals, in *Bowerman v. Lackawana Mining Co.* (98 Mo. App. 308), and *Weston v. Lackawana Mining Co.* (105 Mo. App. 708) neither the necessity for props or a previous request therefor is essential to a recovery, by an injured miner. But for criticism of this holding, by the Supreme Court, see *Wojtylak v. Kan. & Tex. Coal Co.*, 87 S. W. Rep. 506.

⁴ Laws Missouri, 1881, Secs. 14 and 16; Laws Ill. 1899; Secs. 7 and 8, pp. 308, 309.

⁵ *State v. Clark*, 29 N. J. L. 98; *Cone v. Beads*, 9 Gray, 298; *Leslie v. Rich Hill Coal Mining Co.*, 110 Mo., page 39.

⁶ *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Hawley v. Dally*, 18 Bradw. ; *Leslie v. Rich Hill Coal Mining Co.*, *supra*.

tional" failure to perform a statutory duty, and this would be held to be a "willful" violation, or refusal, both under the holdings in Illinois¹ and the decisions in the State of Missouri.² But to constitute an "intentional" refusal to comply with the statute, there must be evidence of a known violation of the statute, for without knowledge, there could be no willfulness, for the "willfulness consists in a failure or refusal to do what the law requires, after notice that the necessity existed."³

§ 92. **What evidence of willful disregard of rule sufficient.** — Generally, wherever it is shown that a reasonable rule, properly promulgated and enforced by the master, intended for the protection of the servant, has been violated, this is sufficient evidence of his contributory negligence, to prevent a recovery by him for an injury consequent upon such violation of the rule, on his part.⁴ But, ordinarily, to constitute a bar to an action for such an injury, it is not only necessary to show that such rule had been brought to the attention of the employee, but it must also be shown that his violation thereof was intentional or was not the result of an unavoidable occurrence on his part. And where a rule prevented miners from leaving a particular portion of a mine at a given time and the absence of the plaintiff was due wholly to his sickness and not to his negligence, this was held, in Illinois, by the appellate

¹ *Fulton v. Wilmington Star Mining Co.*, 133 Fed. Rep. 193; *Niantic Coal Mining Co. v. Leonard*, 126 Ill. 216; *Beard v. Skeldon*, 118 Ill. 584; *Wesley C. C. Co. v. Healer*, 84 Ill. 128.

² *Leslie v. Rich Hill Coal Mining Co.*, 110 Mo., page 39; *Durant v. Lexington Coal Mining Co.*, 97 Mo. 66. But see, *Bowerman v. Lackawana Mining Co.*, 98 Mo. App. 308; *Western v. Lackawana Mining Co.*, 105 Mo. App. 708, criticised in *Wojtylak v. K. & T. Coal Co.*, 87 S. W. Rep. 506.

³ *Leslie v. Rich Hill Coal Mining Co.*, 110 Mo. *loc. cit.* 40.

⁴ In *Last Chance Mining Co. v. Ames* (28 Colo. 167), the violated rule prevented more than one man from riding a car at a time.

court, to show no such willful violation of the rule as to prevent a recovery for a resulting injury to such employee.¹

§ 93. Employment of child, in violation of statute.— Where the negligent act, which occasions the injury, is not due so much to the negligent condition of the ways or work of the employer, as the violation of a statutory duty, in the employment of one whom the statute places as under the age of assumption of risk, as where the statute forbids the employment of children in mines, it seems that a less degree of actionable negligence would be held sufficient to show a liability against the employer, in case of injury to such an employee, for the reason that the employer would violate the duty placed upon him by the law, in the very act of employing such a child. Negligence would arise in the act of entering into the contract of employment and in a recent case, this would seem to have been held sufficient to justify a recovery as against the employer, without proof of a specific negligent act, contributing to the injury sued for.² But this holding occurring in a State where neither the defense of assumed risk or contributory negligence is held to be a defense to an action for the breach of statutory duty, this case would perhaps not be followed in those States where such defenses obtain, and, upon principle, it would seem, that while a violation of the statute ought to subject the employer to any penalty placed upon him, as a result of a breach of such statutory duty, it ought not to render him liable for injuries not so resulting, without some evidence upon which to show a violation of duty directly occasioning the injury complained of.³

¹ Junction Mining Co. v. Ench, 111 Ill. App. 346.

² "The owner of a mine, who employs a child in such mine, contrary to Ill. Mining Act, Sec. 22, is liable for any injury which occurs in its mine, and by the operation of such mine, to such child." Marquette Third Vein Coal Co. v. Dielle, 110 Ill. App. 684.

³ Dresser Emp. Liab., Sec. 51 *et sub.*

§ 94. **Defective hoister rope — Evidence of contributory negligence.** — In a recent California case, where the injury resulted from the breaking of a hoister rope, the plaintiff was held to be guilty of contributory negligence and the facts were that the rope, by which he was being lowered into the mine, had been used by himself and co-employees to pull buckets of dirt out of the mine drift, instead of using a wheelbarrow for the purpose, and that this use had caused the rope, where it would run over the sharp flint rock in the roof of the drift, to get worn and cut and the condition of the rope was held to be due to the negligent use thereof by the plaintiff and his fellow-servants. It was also shown, by the evidence, that a safe and properly constructed ladder was located in the shaft of the mine, which could have been used by the plaintiff and that this was a safer means of entry into the shaft than the rope and hoister and this was also held to be negligence on his part, by the selection of the more dangerous of the two ways to enter the shaft.¹

¹ *Gribben v. Yellow Aster Mining Co.*, 142 Cal. 248; 75 Pac. Rep. 889. "A servant was injured by the fall of a heavy timber, due to the breaking of the inch rope by which it was being lowered. The master was personally superintending the work. The rope had been in use in the work for some time, was old, and, owing to the manner of doing the work, was subject to constant friction. It broke without extraordinary strain, and had parted the day before. *Held*, that the evidence required the submission of the master's negligence to the jury." *Geldard v. Marshall* (Or. 1903), 73 Pac. Rep. 880. "Evidence in an action by a miner for injuries from defective hoisting machinery *held* to show that the proximate cause of the injury was the negligence of a fellow-servant in charge thereof." *Luman v. Golden Ancient Channel Min. Co.*, 74 Pac. Rep. 807. "Evidence in an action by a miner for injuries from alleged defective appliances for hoisting *held* to sustain findings that the machinery was not defective." *Luman v. Golden Ancient Channel Min. Co.*, (Cal. 1908), 74 Pac. Rep. 307. "A complaint, in an action by a servant for personal injuries, alleged that plaintiff, while working at the bottom of a shaft, was injured by the overturning of a bucket used to hoist earth, caused by the defective condition of an iron ring used with the bucket.

§ 95. **Negligence in drilling into unexploded blast.** — In a late North Carolina case, in an action for injuries received while drilling out an unexploded blast in a rock quarry, it appeared that the defendant's vice-principal, in charge of the quarry, without himself making an examination of the drill hole, ordered the plaintiff and his co-employees to clean it out. While doing so the blast exploded, causing the injuries sued for, and it was held that there was sufficient evidence of negligence to submit the issue to the jury.¹ In Kentucky a similar rule is adopted and the liability of the employer is predicated upon the duty to provide a reasonably safe place. The unexploded shot is held to be evidence of an unsafe place, and the fact that it is left by a fellow-servant is held to be immaterial as affecting the master's liability.² But in

It was alleged that the ring was cracked, and too weak to withstand the strain required of it, and that plaintiff, owing to the semidarkness, was unable to inspect the ring closely, but believed it to be sufficient. *Held*, that evidence by another laborer, who worked at the bottom of the shaft, that it was so dark there that he could not determine the condition of the ring without making an actual examination, was proper." *Brazil Block Coal Co. v. Gibson* (Ind. 1903), 66 N. E. Rep. 882.

¹ *Harris v. Balfour Quarry Co.* (N. C. 1904), 49 S. E. Rep. 95.

² *Harp v. Cumberland T. & T. Co.*, 25 Ky. Law Rep. 2183; 80 S. W. Rep. 510. "Where, in an action for injuries to a miner by an explosion, it was claimed that the injury resulted from defendant's negligence in furnishing a quicker fuse than had been previously furnished without notifying plaintiff thereof, a question as to how far away plaintiff had got on the other shifts before the shots went off was proper, as tending to show that the fuse used at the time of the accident was quicker than those used on the preceding shifts." *Hedlun v. Holy Terror Min. Co.*, 92 N. W. Rep. 31. "In an action for injuries to a miner from the premature explosion of a blast he was loading, his testimony that he had used powder of the explosive quality ordinarily furnished, and had also previously used, without injury, powder of the higher explosive power possessed by that used on the occasion in question, removes from the dominion of conjecture a finding that, had plaintiff known of the more dangerous character of the powder employed, he would have been able by increased care to avoid the accident." *Chambers v. Chester*, 72 S. W. Rep. 904.

Missouri,¹ an employee injured from drilling into an unexploded shot is held to assume the risk as an incident to his employment and the master is held not liable for an injury from such a cause, and this seems to be in accord with the weight of authority upon this question.²

§ 96. **Death from suffocation — Presence of combustible material.** — In a late case, in Utah, in an action for the death of a coal miner from suffocation, caused by a fire in the mine, evidence of the defendant's negligence in permitting combustible material to remain in the mine was held to be sufficient evidence of negligence to entitle the plaintiff to a submission of the cause to the jury, upon this issue, as the material left in the mine was of such a

¹ *Livengood v. Joplin Mining & Smelting Co.*, 179 Mo. 229; 77 S. W. Rep. 1077.

² See, also, *Browne v. King*, 100 Fed. Rep. 561; *Kopf v. Stone Co.*, 95 N. W. Rep. 72; *Hendsley v. Williams*, 23 Atl. Rep. 365; *Welch v. Grace* (Mass.), 1 Amer. Neg. Rep. 614; *Cullen v. Norton*, 126 N. Y. 1; *Mast v. Kern* (Oregon), 5 Amer. Neg. Rep. 88; *Lanza v. Le Grand Quarry Co.* (Iowa), 11 Amer. Neg. Rep. 209. "In an action by a servant for injuries sustained from a blast while employed in a quarry, plaintiff's testimony that he had had no experience in a quarry, had never been where they were blasting, and did not know how far or with what force rocks would fly when blasted, was admissible in rebuttal on the issue of contributory negligence." *Neilson v. Nebo Brownstone Co.* (Utah, 1902), 69 Pac. Rep. 289. "Where it was claimed that injuries to an experienced miner were caused by defendant's negligence in furnishing a quicker fuse with which to set off a blast than had been previously furnished without informing plaintiff thereof, and it was shown that there was a substantial difference in so-called standard fuses as to the rapidity with which they burn, which difference was not discernible to even experienced miners, evidence that in plaintiff's opinion the fuse used on the morning of the accident was not of the same quality or character as the fuse previously used by him was not objectionable on the ground that there was no claim that the fuse was defective, or insufficient, or not of standard make." *Hedlun v. Holy Terror Min. Co.* (S. D. 1902), 92 N. W. Rep. 81.

character as made it liable to be ignited from the miners oil lamps in their hats.¹

§ 97. Proving notice of injury, when required by statute. — In some of the States, notice of the time and place of an injury to an employee is required to be given to the employer, as a condition precedent to the right to sue for such injury,² and where such statutes are in force, the plaintiff has no right of action, for an injury received while in the service of his employer, unless he proves that he gave the notice required by the statute.³ But the defense that no notice was given, as required by the Massachusetts law, is unavailing, where, from the nature and character of the defect, the servant did not know of the same.⁴

§ 98. Failure to furnish screen to furnace, negligence, when. — Where the defendants maintained and operated a blast furnace, from which molten iron and other dangerous material was liable to be thrown, without warning, from the mouth of the furnace, and the defendants, knowing this danger from the use of the furnace, had provided a screen for the front of the furnace, to prevent the escape of molten iron therefrom, and after repairing the furnace the screen was left off and was not replaced in front of the furnace, and as a result, the plaintiff was injured by molten metal flying from the furnace upon him, the defendant's failure to have the screen replaced in front of the furnace was held sufficient evidence of negligence to submit the issue to the jury, in Missouri.⁵

¹ *Utah Savings & Trust Co. v. Diamond Coal & Coke Co.*, 26 Utah, 299; 78 Pac. Rep. 524.

² Mass. Rev. Laws, Ch. 106, Sec. 77; Laws N. Y. 1902, Ch. 600, p. 1748.

³ *Johnson v. Roach*, 82 N. Y. Supp. 203; 83 App. Div. 351.

⁴ *Murphy v. Marston Coal Co.*, 183 Mass. 385; 67 N. E. Rep. 342.

⁵ *Curtis v. McNair*, 173 Mo. 270; 73 S. W. Rep. 167.

§ 99. **Evidence that defendant is insured incompetent.** It is quite a common occurrence, of recent years, for those engaged in mining and similar vocations and hazardous trades, where employees are bound to be subjected to more or less danger in the performance of their ordinary duties, to carry insurance upon their business, generally known as an "employers' indemnity policy," by the terms of which the insurers agree to hold the insured harmless, upon stated conditions, for any damages recovered for personal injuries to employees, engaged in the service of the insured.¹ These contracts are very generally held to be purely a transaction between the employer and the insurance company, with which the employee is not at all concerned, and hence, in an action for injuries to an employee, against an employer, who is protected by such a policy, it is not relevant or material to the issues in such a case, to establish the fact of such insurance.² Indeed, in some cases, a mere reference to such a fact, by counsel, in the presence and hearing of a jury, on account of the known prejudice of juries

¹ The forms of these policies differ, but are substantially the same and are now in quite general use in all mining sections, for the great prevalency of actions for personal injuries, of late years, on account of the departure, by the courts, from the common law doctrines, in such cases, makes the conduct of the business, where the employer is forced to carry his own risk, extremely hazardous. "Evidence that an employer carried accident insurance to protect itself against loss from injuries to its employees was inadmissible in an action against the employer for injuries to an employee." *Roche v. Llewellyn Ironworks Co.* (Cal. 1903), 74 Pac. Rep. 147. The fact of insurance on the part of the employer was held incompetent, in *Sawyer v. Arnold Co.*, 90 Me. 369; 88 Atl. Rep. 333; *Anderson v. Duckworth*, 162 Mass. 251.

² Evidence in an action by an employee for personal injuries that the employer requested an insurance company insuring the employer against loss from injuries to its employees, to defend the action, was inadmissible. *Roche v. Llewellyn Ironworks Co.* (Cal. 1903), 74 Pac. Rep. 147.

against insurance companies, has been held to be reversible error.¹

§ 100. Variance — Proof must correspond with pleading. — As a general rule, in actions for injuries from negligence, the doctrine is most strictly enforced that the

¹ *Lipschulz v. Ross*, 84 N. Y. Sup. 632. In *Manigold v. Black River Co.* (84 N. Y. S. 861; 81 App. Div. 381), plaintiff's counsel asked a physician if he had not tried to settle with plaintiff and if he had not represented an accident insurance company. The answer was excluded, but it was held, that in the absence of a showing to the contrary, the mere asking of the question, by plaintiff's counsel, would be presumed prejudicial and the cause, for this reason, was reversed. But for cases where the remarks of counsel were held not prejudicial, see, *Hedlm v. Holy Terror Mining Co.* (S. D. 1902; 92 N. W. Rep. 81), where a release was procured by an agent of an accident company and it was held proper for counsel to comment on the methods employed to get it, and also, *Burgess v. Stowe* (Mich. 1903; 96 N. W. Rep. 29), where the remarks of counsel did not go to the extent of commenting on this incompetent phase of the case. Evidence that the employer carried insurance is held inadmissible, in the following cases. *Roche v. Llewellyn Ironworks Co.*, 140 Cal. 563; 74 Pac. Rep. 147; *Barrett v. Bonham Oil Co.* (Tex.), 57 S. W. Rep. 602; *Sawyer v. Arnold Co.* (Me.), 88 Atl. Rep. 333. "Plaintiff alleged that, having sued his employer, a mining company, for injuries, defendant insurance company, unlawfully, willfully, and maliciously, without interest, 'maintained the mining company' by prosecuting an appeal from a judgment in favor of plaintiff; that defendant paid all the expenses of the appeal, which resulted in a reversal, after which defendant maintained the defense at its own expense, and in various ways caused delay, until plaintiff only succeeded in recovering a second judgment after the mining company became insolvent, and was then compelled to accept \$1,000 in settlement of a judgment for \$3,500; that, but for the defendant's unlawful interference, plaintiff would have collected the first judgment, and would have secured a second judgment in time to have collected it before the mining company became insolvent. Held, that the petition stated a cause of action for maintenance. 'Where an insurance company has indemnified a corporation from liability for injuries to its employees, it is not a volunteer in defending an action against insured for such injuries, and is therefore not liable, as an intermeddler, for maintenance.'" *Breeden v. Frankfort Marine Accident & Plate Glass Insurance Co.* (Kansas City Court of Appeals, Missouri, Feb. 27, 1905); 85 S. W. Rep. 930; 60 Cent. Law Jour. 429.

allegation of the petition and the evidence, at the trial, as to the cause of the injury and grounds of negligence, upon which a recovery is predicated, must correspond, and for any variance, material to the defendant, between the pleading and proof, if timely taken advantage of, the rights of the defendant will be protected.¹ Where the ground of negligence alleged by the plaintiff was that he was put at work, by the defendant, without notice or warning of the dangers of the situation, but the evidence, at the trial, developed that the real cause of the injury was a defective appliance furnished the plaintiff, a nonsuit was held properly directed.² But a mere variance which would not essentially affect the rights of the defendant, or materially change the defense to the action, would not be regarded as material by the court, and it has been held that where the petition alleges knowledge on the part of the defendant of the defects or dangers occasioning the injury, it is not a substantial variance, to permit evidence of constructive

¹ *Studenroth v. Hammond Co.*, 106 Mo. App. 480; 81 S. W. Rep. 487. "In a suit by a servant for the negligence of his master, evidence of the circumstances attending the transaction resulting in the injury are admissible, though such evidence may show other acts of negligence than the one alleged; but the evidence will not justify a recovery, unless the specific act of negligence is established." *Palmer Brick Co. v. Chenall* (Ga. 1904), 47 S. E. Rep. 329. "Where, in an action by an employee for personal injuries, the petition sets forth general allegations of negligence, followed by an averment of the specific act of negligence, there can be no recovery, unless the specific act is established to the satisfaction of the jury." *Palmer Brick Co. v. Chenall*, 47 S. E. Rep. 329. Evidence to the effect that a mine entry was in "fair" condition does not establish that its condition was "safe" *Junction Min. Co. v. Ench*, 111 Ill. App. 346. "In an action for injuries to a servant, evidence held to show that plaintiff was injured by the swinging of a scale board, as alleged in his petition, and not by reason of having been ordered under the scale board as alleged in a rejected amendment." *Simonds v. Georgia Iron and Coal Co.* (U. S. C. C. A., Ga. 1904), 133 Fed. Rep. 776; judgment affirmed *Georgia Iron & Coal Co. v. Simonds*, *Id.* 1019.

² *Moyer v. Ramsey Brisbane Stone Co.*, 119 Ga. 784; 46 S. E. Rep. 844.

knowledge, arising from proof of the dangers of the condition and the length of time that same had continued, without proof of actual knowledge, on defendant's part.¹

¹ *Carrelli v. Jackson*, 77 Conn. 115; 58 Atl. Rep. 762. Where the allegation of negligence is that an appliance was defective in that it was made out of cast steel, instead of malleable iron, unless the evidence shows that it was so made, there is a fatal variance. *Breeden v. Big Circle Mining Co.* (Mo. App. 1903), 76 S. W. Rep. 731. But a mere variance as to the details of the injury will not justify a nonsuit. *Nord v. Boston & M. Con. Copper & Silver Min. Co.*, 75 Pac. Rep. 681. "Under a complaint against a master for injury to an employee, alleging negligence, in that the injury was caused by the incompetency of defendant's superintendent, B., in directing the execution of the work in an unsafe manner, and in ordering plaintiff to do a hazardous act not so known to be by B., on account of his incompetency, evidence that B. was a vice-principal, and, while not incompetent, was negligent, is not admissible." *Harris v. Balfour Quarry Co.* (N. C. 1902) 42 S. E. Rep. 978. "In an action for the death of a servant owing to the breaking of a ladder forming part of a scaffolding, that the declaration alleged that defendant 'was possessed of and owned a certain ladder,' and the proof showed that defendant had been possessed of the ladder, but the ownership was in doubt, constituted no variance, the ownership being immaterial." *Ehlen v. O'Donnell*, 68 N. E. Rep. 766.

CHAPTER VI.

ISSUES PROPERLY SUBMITTED TO JURY.

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- 102. Nature and cause of injury.
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 - 105. Capacity in which foreman acted.
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 - 109. When contributory negligence a jury question.
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 - 126. Safety of appliance causing injury.
 - 127. Upon failure to inspect mine.
 - 128. Jury issues in injuries from hoisting appliances.
 - 129. Other instances of jury cases.

§ 101. In general — All disputed questions of fact. —
In the organization of the court, where a jury is selected,
as an adjunct of the other officers of the court, for

the trial of a case, their peculiar office is to pass upon all disputed questions of fact submitted to them by the court and within the lines of their function, as triers of the facts, they operate along independent lines and within the scope of the powers parceled out to them, in the trial of a case, they are independent of the judge or other officers of the court. It is a familiar platitude to trial lawyers that juries are the "sole judges of the credibility of the witnesses" and of the faith and credit to be given to their testimony, and this follows as a necessary consequence of their powers to pass upon the facts testified to, for if the witness is not to be believed, the facts testified to will count for little and it would not do to let the judge tell the jury that this or that witness was unworthy of credit, for this would amount to a practical usurpation of the power of the jury. The judge passes upon all questions of law in the case being tried and defines and lays down, for the consideration and determination of the jury, the issues of fact, and the jury, as to all issues submitted to them, pass upon the facts and determine which of the litigants, in the light of all the evidence in the case, ought or ought not to recover. Not being familiar with the rules of evidence, juries are sometimes prompted by matters that should not influence them, to return verdicts that are not always in accordance with the safest guides for recognizing the right and wrong side, in a lawsuit; but, on the whole, the verdicts of juries, although tending toward the humane and charitable, if not the emotional, are generally responsive to the equitable promptings of the human heart and for this reason, no better institution has yet been discovered, in the practical administration of justice, than the common-law jury of twelve men, presided over by a judge, learned in the law to direct and supervise their findings. The lawful jury, consisting of "twelve good and lawful men," are usually

competent to pass upon most questions of fact that arise in the trial of a lawsuit, and as experience has proven that their findings are more often right than wrong, the courts will not interfere with verdicts, unless clearly the result of passion or prejudice and opposed to natural justice or the instructions of the court. For this reason all disputed questions of fact are submitted to the jury and their finding, if in accord with the law, as given to them by the court, is usually conclusive upon the parties whose differences are submitted to them to decide.¹

§ 102. **Nature and cause of injury, in general.** — Regardless of the specific ground of negligence upon which the action is based, the nature and cause of the injury to the plaintiff and the bearing and effect of the negligence of the defendant and whether or not it was the direct or remote cause of the injury, are, primarily, jury questions.² And where the evidence of the plaintiff furnishes one cause for the injury and that resulting from the negligence of the defendant and the evidence of the defendant supplies another cause, not under its control, this will not justify a peremptory instruction for the defendant, under the principle that where the undisputed evidence presents a case

¹ "If there is uncertainty, on all the evidence, as to the existence of negligence or contributory negligence, whether arising from a conflict of testimony, or because, the facts being undisputed, fair-minded men may honestly draw different conclusions therefrom, the case should not be withdrawn from the jury." *Tenn. Coal, Iron & Co. v. Currier*, 108 Fed. Rep. 19; 47 C. C. A. 161.

² *Houston Co. v. Dial*, 135 Ala. 168; 38 So. Rep. 268; *Chenall v. Palmer Brick Co.*, 117 Ga. 106; 43 S. E. Rep. 448; *Sinclair Co. v. Waddle*, 200 Ill. 17; 65 N. E. Rep. 437; *Parsons v. Hammond Co.*, 96 Mo. App. 372; 70 S. W. Rep. 519; *Franklin v. M. K. & T. Co.*, 97 Mo. App. 473; 71 S. W. Rep. 540; *Olson v. Boston and C. M. Co.*, 71 N. H. 427; 52 Atl. Rep. 1097; *Allison v. Tap Rock Co.*, 78 N. Y. S. 69; 75 App. Div. 267; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25; 70 Pac. Rep. 111; *Schultz v. Chicago & M. Co.* (Wis. 1902), 92 N. W. Rep. 377.

where the injury may have resulted from one of two causes for one of which the defendant would be liable and for the other of which there would be no liability, there can be no recovery, as the evidence, in the case named, would present a mere conflict and it would remain a jury question, as to just which cause occasioned the injury.¹

§ 103. When proximate cause of injury jury question. When the facts as to the exact cause of the injury to the plaintiff are in dispute and it could not be said by the court, as a matter of law, that the negligence of the plaintiff or that of the defendant caused the injury, the question of what was the approximate cause of the injury is properly submitted to the jury. Accordingly, in Arizona, it is held, that whether the defendant's negligence is the approximate cause of an injury, or the negligence of a fellow-servant is responsible, as the direct cause thereof, if the evidence is conflicting, it should be submitted to the jury.²

§ 104. Injury from act of vice-principal. — Whether or not an injury from an act of a vice-principal, doing the work of a fellow-servant, is or is not a jury case, depends upon the peculiar theory which obtains within the jurisdiction of the action, with reference to the liability or non-liability of the master for acts of the vice-principal, done in the capacity of a fellow-servant. In Texas, an employee injured while engaged in undermining a bank of salt, by being struck with a hoe, in the hands of a vice-principal, was held to be entitled to have the question of the defendant's negligence submitted to the jury.³ The Mis-

¹ *Peters v. McKay & Co.*, 136 Cal. 73; 68 Pac. Rep. 478. Under the Illinois Miners Act, as to what was the proximate cause of the injury, is a question for the jury. *Donk Bros. Coal & Coke Co. v. Peton*, 95 Ill. App. 198; 61 N. E. Rep. 830.

² *Gila Valley & G. N. Co. v. Lyon*. 71 Pac. Rep. 957.

³ *Roberts v. Fielder Salt Works*, 72 S. W. Rep. 618.

souri Court of Appeals has also held that a miner is entitled to have the cause of injury passed upon by a jury, although he was injured — or killed — by a missile inadvertently thrown by the superintendent or ground foreman, acting as a fellow-servant with him, at the time of his injury.¹ But the Supreme Court of Missouri adhere to the dual capacity doctrine and hold that an employee, injured by an act, as distinguished from an order from the vice-principal, in the scope of his capacity as a representative of the master, performed by the vice-principal while acting as a fellow-servant, will give no right of action.²

§ 105. **Capacity in which foreman acted.** — Where the evidence in an action for an injury from the negligence of a vice-principal, is conflicting, the fact of whether or not the foreman, or other representative of the master, acted in the capacity of a foreman or vice-principal, or as a fellow-servant, in doing the act which occasioned the injury, is for the jury. This was held in a late case, in Minnesota, as to an injury from alleged negligence in connection with skip cars, in the defendant's mine, and it was held that the capacity in which the foreman acted and his negligence, were for the jury.³ But where there is no dispute in the evidence as to the character in which he performed a certain act, then the question of his capacity is one of law for the court and a peremptory instruction should be given that he was, or was not a fellow-servant,

¹ *Strode v. Conkey*, 105 Mo. App. 12. Here, a superintendent, on top of the ground, undertook to throw a block into a car and missed the car and it fell down the shaft, killing the plaintiff's ward, the defendant being held liable for his death, caused by such act.

² *Fogerty v. St. Louis Transfer Co.*, 180 Mo. 490.

³ *Renlund v. Commodore Mining Co.*, 89 Minn. 41; 98 N. W. Rep. 1057. See, also, *Maxwell v. Zdariski*, 93 Ill. App. 834.

in the doing of the act which occasioned the injury complained of.¹

§ 106. **Assumption of risk, jury question, in Missouri.** Whether or not a servant assumes the risk of injury from incidental matters even, arising during the course of his employment, is held, in Missouri, to be a question of fact for the jury. To authorize the court to say, as a matter of law, that the risk was assumed, the evidence must be all one way and to one effect, that is, that the danger was so open and glaring that it could not escape the observation of an ordinary prudent man.² This rule was recently applied, by the appellate court,

¹ *Jackson v. Mining Co.*, 106 Mo. App. 441. Although the evidence shows that the master is represented by the servant causing the injury, at the time of the injury, yet, if the facts all point to the conclusion that the act which occasioned the injury was done by the representative, as a collaborer, there can be no recovery, as a matter of law. *Fogerty v. Transfer Co.*, 180 Mo. 490. "In an action to recover for the death of a laborer in a mine, caused by the negligence of the master in controlling its skip cars, the capacity in which the foreman was acting, and the question of his negligence, were for the jury." *Renlund v. Commodore Min. Co.* (Minn. 1903), 93 N. W. Rep. 1057.

² *Sinberg v. Falk Co.*, 98 Mo. App. 546; 72 S. W. Rep. 947; *Carter v. Baldwin*, 107 Mo. App. 217; 81 S. W. Rep. 204; *Hamman v. Central Coal & Coke Co.*, 156 Mo. 232. See, also, *Dean v. Woodenware Co.*, 107 Mo. App. 167. The cases could be multiplied on this doctrine, in Missouri, *ad infinitum*. "Where the servant suing for injuries knew the condition of the appliance causing the injury, and had used it prior to the time thereof, it is a question for the jury whether the danger from its use was so apparent that a man of ordinary prudence having knowledge of it would not have incurred it." *Judgment* (1902), 103 Ill. App. 433, affirmed; *Harwich v. Hawes*, 67 N. E. Rep. 13; 202 Ill. 834. "The question of assumed risk is usually one of fact for the jury, and to authorize the court to hold as a matter of law that the risk was assumed the evidence must be all one way, and to the effect that the danger was so open and glaring that it could not have escaped the observation of an ordinarily prudent man, or the notice of one with the experience of the injured servant." *Carter v. Baldwin* (Mo. App. 1904), 81 S. W. Rep. 204.

in Missouri, in a case where an experienced miner, nineteen years of age, called the attention of the foreman to a crevice, indicating danger, extending the entire length of a slab of rock, on which he was at work, in a drift in the defendant's mine. The knowledge and glaring nature of the defect was held to be such that he would not assume the risk, as the foreman told him he thought it would stay until he finished his work and the fact that he had known it the day before the injury and that it had not fallen, and the foreman's expression of opinion that it would not fall, were held sufficient to send the case to the jury.¹ However, the Supreme Court of Missouri, in an earlier case, laid down a doctrine in direct conflict with this holding, as it held that if a minor employee even, had knowledge of a crevice in a bank of clay, on which he was at work, he would, as a matter of law, be held to a knowledge of the law of nature which might precipitate such bank upon him at any time, and that with such knowledge he would assume the risk. This is the rule the appellate court, under the constitution, in Missouri, were bound to follow in the above case, but it was, presumably, overlooked by the court.²

¹ *Carter v. Baldwin*, *supra*.

² *Aldrich v. Furnace Company*, 78 Mo. 559. "In an action against a mine owner for injuries to a miner alleged to have been caused by failure of defendant to keep the roadway along which plaintiff was required to drive a car in a safe condition, and also in requiring plaintiff to drive a vicious mule, evidence held sufficient to support a finding that plaintiff had not assumed the risk." *Henrietta Coal Co. v. Campbell*, 71 N. E. Rep. 868; 211 Ill. 216. "Whether an employee has assumed the risk, and so is barred from recovery, is a question for the jury; the evidence being conflicting as to whether the work requiring the cover to be off the hole into which he stepped had been completed, and it was time for covering it." *Sinberg v. Falk Co.* (Mo. App. 1903), 72 S. W. Rep 947. "After plaintiff was employed to work in a woodenware factory, he was ordered to work at a saw which was defective, and while so engaged a board was hurled from the saw, striking him in the stomach, causing

§ 107. **Wisconsin rule — Jury question, when evidence disputed.**—The rule, as to assumption of risk, in Wisconsin, as announced in a recent case, goes almost as far as the rule established in Missouri, but not quite. In Missouri, in some cases, the defense of assumed risk is held a jury question, without reference to the nature of the evidence. In Wisconsin, it is held that an employee cannot be said, as a matter of law, to have assumed the risk incident to his employment, unless such assumption is shown by undisputed evidence, or is so clearly proven that no reasonable inference can be drawn to the contrary.¹

§ 108. **Objections to this doctrine.**—The objection to this doctrine is that it improperly declares the law, as applied in other States, where the common law doctrine of assumed risk obtains. At common law—and this is where the doctrine of a non-liability for injuries from risks incident to the service of the employee had its origin—the employee, by the contract of employment, was held to assume the risk of all injuries from perils incident to his employment. Unless, in the administration of the law, the master gets the full benefit of the common law application of the rule, then the law is not properly administered. To qualify this doctrine, by saying that the employee only assumes those dangers “which threaten immediate injury” or to announce, as another limitation upon the doctrine that those risks are not assumed unless the danger was so apparent that the servant, as a reasonable man, “could have readily appreciated the danger,”

him to thrust his left hand along the smooth surface of the table until it came in contact with the saw. *Held*, that, in the absence of proof that the danger to plaintiff of being injured in that manner was obvious and known to him, whether he assumed the risk was for the jury.” *Dean v. St. Louis Woodenware Works* (Mo. App. 1904), 80 S. W. Rep. 292.

¹ *Revolinsky v. Adams Coal Co.*, 95 N. W. Rep 122.

practically repudiates the doctrine.¹ Under the issue, as to whether or not a given danger is or was threatening and presaged immediate injury, a jury can and they usually do, resolve the issue against the employer. Under the issue as to whether a reasonable man would or would not have appreciated the danger, the plaintiff is always ready to testify that he did not and thought "by reasonable care that he could avoid injury," and thus, the defense of assumed risk, on the part of the employer, is practically eliminated in Missouri. A return, by the courts, to the common law application of the doctrine, would not only meet with the approval of the bar of the State, generally, but the law would then be administered with some degree of certainty and the decisions, in given cases, would not be continuous illustrations of the exceptions to the old rule, recognized in most of the States of the United States, but would be solid precedents, based upon the adamant fabric of the common law, which the experience of ages has demonstrated to be the safest guide to the courts in determining the rights of citizens, entitled to its benefits.²

¹ In *Minnler v. Sedalia &c. Company* (167 Mo. 94), the Supreme Court of Missouri, seem to rather retrace their way, to a limited extent, as the court refused to approve an instruction which told the jury that only dangers which threatened "immediate injury" were assumed, holding that such a limitation of the doctrine was a denial of the common law rule, which was recognized to include not only perils that threatened "immediate injury," but also those which were not so glaring, if incident to the employment.

² Mr. Libatt, in the preface to his recent excellent two volume work upon the liability of master for injuries to the servant, complains of this common law rule of assumed risk for injuries from fellow-servants and advocates an entire abolition of the rule, by statutes, in all the States. With the increasing tendency toward damage suit litigation and the practical abolishment in many of the States, of the common law rule, as announced by the older cases, it may well be doubted if the courts have not already done much toward relieving the necessity for legislative action, upon this subject.

§ 109. **When contributory negligence a jury question.** Unless the evidence of the plaintiff's negligence is such that reasonable men would not be inclined to differ upon the proposition of whether or not the injury of the plaintiff was due primarily to his own neglect, the issue as to his negligence contributing to the injury complained of ought to be submitted to the jury. This is elementary law, upon the question of contributory negligence. Under this general rule, it is held, in a late Iowa case, where the injured employee was employed in hauling coal, in a mine, and was seriously injured, as a result of a dangerous place in the way he was accustomed to travel, that whether or not, under all the circumstances, he was guilty of contributory negligence, was a question of fact for the jury.¹ A similar holding is announced, in New York,² in regard to an action for an injury upon a defective scaffold. The plaintiff discovered a defect in the scaffold and called the attention of the proper person thereto, who promised to repair it and it was held that the question of the plaintiff's negligence in again going upon the scaffold, without looking to see if it had been repaired, was for the jury. And, generally, unless contributory negligence is shown by undisputed evidence, or is so clearly proven that reasonable minds would not differ as to the conclusion to

¹ *Collingwood v. Illinois & Iowa Fuel Co.*, 101 N. W. Rep. 283.

² *Hempstock v. Lackawana Iron & Steel Co.*, 90 N. Y. S. 663; 98 App. Div. 832. See, also, *Olsen v. Cook Inlet Coal Fields Co.* (121 Fed. Rep. 726; 58 C. C. A. 146), where the contributory negligence of an employee in assuming a dangerous position between the engine and first car, was held to be properly submitted to the jury. Working in the absence of a screen for a blast furnace, is not contributory negligence, as a matter of law. *Curtis v. McNair*, 173 Mo. 270; 73 S. W. Rep. 167. Nor is a driver guilty of negligence as a matter of law, by being injured by an overhanging rock, because his mule was not injured also in the accident. *Hamilton v. Mendota Coal & Mining Co.* (Iowa, 1903), 94 N. W. Rep. 282.

be drawn from the evidence, the question should be submitted to the jury, as an issue of fact.¹

¹ *Revolinsky v. Adams Coal Co.* (Wis. 1903), 93 N. W. Rep. 122. See the well considered case of *Alaska United States Gold Mining Co. v. Muset* (114 Fed. Rep. 66), where the plaintiff's decedent's negligence in not placing a chain ladder to use to ascend from the shaft before lighting blast, was held a jury issue. "Evidence in an action by a servant for personal injuries examined, and *held*, that the question of the servant's contributory negligence was for the jury. The question of a servant's contributory negligence is for the jury, unless the facts show want of care to that degree which leaves no room in the minds of reasonable men for a difference of opinion." *Jancko v. West Coast Mfg. & Inv. Co.* (Wash. 1904), 76 Pac. Rep. 78. "Whether plaintiff was guilty of contributory negligence and assumed the risk of injury, *held* to be questions for jury, under the evidence, in an action by a miner against his employer for injuries resulting from an explosion occurring when plaintiff went to investigate the cause of delay of a fuse to act." *Currans v. Seattle & S. F. Ry. & Nav. Co.*, 76 Pac. Rep. 87. "A servant, a child of 14 years, was ordered by his master to assist in cleaning and oiling a brick machine while the same was in motion by steam. The work was highly dangerous, but could be accomplished without injury. *Held*, that the question whether the servant was guilty of contributory negligence was properly left to the jury." *Ittner Brick Co. v. Killian* (Neb. 1903), 93 N. W. Rep. 951. "A miner was not guilty of contributory negligence, as a matter of law, in attempting, while on his way to work, to cross a lagging which had been put in since he last crossed the space which it covered, and which was composed of planks of the same kind usually used in mines for the same purpose." *Garity v. Bullion Beck & Champion Min. Co.* (Utah 1904), 76 Pac. Rep. 556. "A servant injured by the caving in of a tunnel in which he was working, and which was insufficiently timbered, cannot be charged with contributory negligence as a matter of law, where it was shown that he was inexperienced in the work, and there was evidence tending to show that the master assured him the place was safe, and that planks were put up by direction of the master to hide the danger from the workmen." *Swensen v. Bender* (U. S. C. C. A., Cal. 1902), 114 Pac. Rep. 1. "While the combined use of hand and horse power in moving rails in building a railroad track is unusual and unsafe, yet the danger is not so obvious that the court can declare that the servant ordered to work in that way is guilty of contributory negligence. That question should be submitted to the jury." *Kane v. Falk Co.*, 93 Mo. App. 209. "In an action, by one employed in hauling cars loaded with coal in a mine, for injuries sustained in consequence of a dangerous place in the way, the

§ 110. When the issue as to fellow-servants should be submitted to jury. — When the essential facts for determining who are fellow-servants are not controverted, the question as to whether those occupying a given relation are, or are not, fellow-servants, is one of law for the court.

question whether he was guilty of contributory negligence *held* for the jury." *Collingwood v. Illinois & I. Fuel Co.* (Iowa, 1904), 101 N. W. Rep. 288. "In an action for injuries sustained by an employe in a quarry, occasioned by the slipping of the grappling hooks, which he had assisted in fastening, allowing a stone to fall and strike a pole among some wood, which the foreman had requested such employee and another to remove from the floor as obstructing the fastening of the hooks to the stone, the evidence considered and *held* to require the submission of the question of the employee's contributory negligence to the jury." *Sikes v. Missouri Granite Co.*, 92 Mo. App. 12. "Plaintiff was employed about blast furnaces for the reduction of iron, was engaged on the ground hauling iron to the furnace, and had never worked on the top of the furnace, where workmen were often overcome by gas and had to be relieved. A shanty was constructed on the platform at the top of a furnace for the purpose of affording the men a place to "spell off" when affected by gas. The shanty contained a stove, a bench, and blocks of wood on which the men sat. Plaintiff had been on top of the furnace on two occasions to sweep, and when he was there no gas was escaping. On the morning of the injury plaintiff was ordered by the foreman to go to the top of a furnace other than the one around which he worked, and was not informed of the conditions, or given any information as to the danger he was likely to meet there, or informed that he was at liberty to come down when affected by the gas. The foreman followed plaintiff about five minutes after he went to the top, and found him with his head out of the window trying to get fresh air, and ordered him to take the place of a man who had been overcome by gas. In a short time plaintiff again went to the shanty. He sat down, and, becoming unconscious, fell on the hot stove, sustaining the injuries complained of. *Held* insufficient to show that plaintiff's injury was due to his own negligence." *Illinois Steel Co. v. Ryska*, 102 Ill. App. 347, judgment affirmed 65 N. E. Rep. 734; 200 Ill. 280.

¹ Where all reasonable men would reach the same conclusion and the facts are not disputed it is a question of law. *Illinois Steel Co. v. Coffee* (107 Ill. App. 582, reversed), 205 Ill. 206; 63 N. E. Rep. 751; *Gruendahl v. Consolidated Coal Co.*, 108 Ill. App. 644; *Shaw v. Bambrick-Bates Con. Co.*, 102 Mo. App. 666; 77 S. W. Rep. 96; *O'Leary v. R. R.*, 52 Ill. App. 641; *Neal v. R. R.*, 57 Minn. 365; 59 N. W. Rep. 312.

But the existence of the relation of fellow-servants, where the evidence on the point is conflicting, is a question of fact for the jury.¹ And where the servant whose act occasions the injury to the plaintiff, occupies a dual role of vice-principal and fellow-servant, whether the act which occasioned the injury was the act of a vice-principal or the act of a fellow-servant, will, generally, be held to be an issue for the jury.² The existence of the relation of fellow-servants is held to be, in some States, a mixed question of law and fact, the definition, of what constitutes a fellow-servant, being a matter of law for the court and the determination of the question of whether or not the relation, as thus defined, exists, being a fact for the jury to determine.³

¹ *Missouri Malleable Iron Co. v. Dillon*, 106 Ill. App. 649; 206 Ill. 145; 69 N. E. Rep. 12; *Chicago & Alton Co. v. Wise*, 106 Ill. App. 174; 206 Ill. 453; 69 N. E. Rep. 500; *Gayle v. Missouri Car & Found. Co.*, 177 Mo. 427; 76 S. W. Rep. 987. Where the facts are disputed, the issue as to whether or not a "pit boss" in a mine, was a fellow-servant of the injured employee, was for the jury. *Consolidated Coal Co. v. Fleishbein*, 109 Ill. App. 509; 207 Ill. 593; 69 N. E. Rep. 963. And where the facts tend to establish that a mule driver and the plaintiff, a miner, in the defendant's service are entirely independent of each other, in the performance of their duties, the question of whether or not, under all the facts, they are fellow-servants, is for the jury. *Spring Valley Coal Co. v. Robias*, 207 Ill. 226; 69 N. E. Rep. 925. Held to be a jury question in *Supple v. Agnew*, 191 Ill. 439; 61 N. E. Rep. 392; *Pagels v. Myers*, 193 Ill. 172; 61 N. E. Rep. 1111.

² *Chicago & Eastern Illinois Co. v. Driscoll*, 107 Ill. App. 615; 207 Ill. p. 432; 69 N. E. Rep. 620.

³ *Consolidated Coal Co. v. Gruber*, 91 Ill. App. 15; 49 N. E. Rep. 254. "The existence of the relation of fellow-servants is, where the evidence on the point is conflicting, a question of fact for the jury." Judgment, 106 Ill. App. 649, affirmed." *Missouri Malleable Iron Co. v. Dillon*, 69 N. E. Rep. 12; 206 Ill. 145. "It is generally a question of fact for the jury to decide, on the evidence and under the instructions of the court, as to what constitutes fellow-servants; but when the undisputed evidence shows that they are fellow-servants, it is not error for the court to so hold as a matter of law." *Gruendahl v. Consolidated Coal Co.*, 108 Ill. App. 644.

§ 111. When negligence of defendant a jury question. — As a general rule, where the acts alleged to constitute the negligence complained of, whether on the part of the plaintiff or the defendant, are such as would admit of more than one construction and reasonable minds might differ as to whether or not negligence could be predicated thereof, such acts cannot be pronounced negligence, *per se*, but the court will submit the issue as to whether or not they constitute negligence to the jury.¹ Accordingly, where a miner was injured by a fall of rock from the roof of the drift, whether or not the defective condition of a pillar cap was the approximate cause of the injury, was held to be, under the evidence, a question for the jury;² this was also held, in an action for injury and death from a falling car, where the negligence charged was a failure to furnish a sufficient “chock” to hold the car;³ in an action for an injury from the breaking of an alleged defective brake hoist, which gave way, and whether or not the defective hoist, or the negligence of an engineer, in raising his foot off the brake, caused the injury,⁴ and, generally, this is the rule wherever the negligence arising from the facts shown by the evidence is left in doubt or the court would not be justified, as a matter of law, in concluding, from the facts proven, that this or that act did or did not constitute negligence.⁵

¹ Robard v. Murphy, 75 Mo. App. 39.

² Cecil v. Amer. Sheet Steel Co., 129 Fed. Rep. 542.

³ Sloss-Sheffield Steel & Loan Co. v. Mobley, 139 Ala. 425; 36 So. Rep. 181.

⁴ Bernard v. Pittsburg Coal Co. (Mich. 1904), 100 N. W. Rep. 396.

⁵ Leduc v. North Pac. Co. (Minn. 1904), 100 N. W. Rep. 108. “Plaintiff was employed by defendant’s superintendent to dig down certain banks of salt, and as he was doing so such superintendent, without plaintiff’s knowledge, began to dig salt with a hoe near where plaintiff was working, and while so doing plaintiff was struck by the superintendent with the hoe, and injured. Held, that such facts required a submission

§ 112. **Same — When based upon statutory negligence.** — In the different mining States the rule is differently regarded as to the effect of a violation of the miners' acts, passed for the protection of workmen in mines. In some, a violation of the statute is negligence, as a matter of law; in others, it may or may not be, if the evidence is conflicting, or the application of the statute plain, and the issue is a jury question, and in still others, no defense can prevail where a violation of the statute and a consequent injury is shown, not even the contributory negligence of the plaintiff.¹ In actions for violations of the prop statute of Missouri as construed by the appellate courts of the State, it is a jury question whether or not a necessity for props existed and it is held to be a duty of the defendant to send down such props, where the evidence shows that a necessity does exist therefor.² In Ohio, the question is regarded in the same light as a common law charge of negligence, for the same cause would be treated, and if a reasonably prudent man, under the circumstances, would have furnished props, then the defendant is liable, on such

of the issue of defendant's negligence to the jury." *Roberts v. Fielder Salt Works*, 72 S. W. Rep. 618. "In an action by a quarry employee against his employer for personal injuries caused by an explosion resulting from putting a tamping bar into a hole for blasting, which had been drilled, and a charge of dynamite inserted, but not exploded, of which fact plaintiff was not aware, evidence examined, and whether defendant was guilty of negligence, *held* to be a question for the jury." *Lanza v. Le Grand Quarry Co.* (Iowa, 1904), 100 N. W. Rep. 488. "It is for the jury to determine, in an action for injuries to an employee, whether the circumstances show that the occurrence was of such an unusual character that the inference of negligence would arise, which would overcome the presumption of law that the master had furnished proper instrumentalities, a safe place to work, and competent servants." *Palmer Brick Co. v. Chenall* (Ga. 1904), 47 S. E. Rep. 829.

¹ See Chapter, Statutes for Protection of Miners. *O'Fallon Coal Co. v. Laquet*, 198 Ill. 125; 64 N. E. Rep. 767; *Illinois Steel Co. v. Star*, 199 Ill. 116; 64 N. E. Rep. 964.

² *Bowerman v. Lackawana Mining Co.*, 71 S. W. Rep. 1062.

a finding by the jury.¹ Under the Tennessee statute requiring the proper ventilation of mines, an employer who fails of his duty in this regard, is held liable for breach of his duty, on a finding that a violation of the statute has occurred,² and so the cases could be indefinitely multiplied in most of the States, that upon the basic question of a violation of the statute, under the evidence, the jury alone are qualified to pass upon the question, while in applying the statute to the case before the court, the judge and not the jury, determines the issue, as a matter of law.

§ 113. **Same — Injury from projecting set screw.** — Where the evidence in a suit for injuries tends to establish the fact that the injury of the plaintiff was caused by a projecting set screw on the collar of a shaft, at a place where it did not belong and the evidence was conflicting as to whether or not the presence of such set screw, at such a place, was negligence, on the part of the defendant, it was held to be properly a jury question as to whether or not the negligence of the defendant, in permitting such set screw to remain on the collar of the shaft, was the approximate cause of the injury to the plaintiff, or whether he was injured as a result of his own negligence.³

§ 114. **Injuries from failure to timber roof of mine.** — Where the cause of injury alleged by an employee is the defendant's failure to properly secure the roof of a mine, if the evidence in respect to the negligence of the defendant is conflicting, in failing to use reasonable care or caution

¹ Cecil v. American Steel Co., 129 Fed. Rep. 542.

² Russell v. Dayton Coal & Iron Co., 70 S. W. Rep. 1. Whether or not a door in a mine is a "principal door," within the meaning of the Illinois law, is a question of fact for the jury. Elmrod Coal Co. v. Stevens, 67 N. E. Rep. 889. See, also, Donk Bros. Coal & Coke Co. v. Denman, 185 Ill. 413; 57 N. E. Rep. 192.

³ Regan v. Sargent Company, 98 Ill. App. 617.

to properly secure the roof of the mine, it is proper to refuse a peremptory instruction for the defendant, but the issue should be submitted to the jury, as to the negligence of the defendant.¹ In Illinois, a miner employed to operate a machine and having nothing to do with the propping or timbering of the mine, was killed by a fall of the roof. There was evidence that the manager of the mine had been informed of the dangerous condition of the roof before the accident, but this evidence was denied by the manager and the issue of the defendant's knowledge of the defective condition, on this evidence and the consequent negligence, was properly held submitted to the jury.² And in Missouri, where a miner was killed as a result of the falling of the roof in a coal mine, and the evidence is conflicting as to whether or not the employee was furnished with props a sufficient length of time to have used them, prior to the injury, the question is held properly submitted to the jury.³ And not only is the question of the furnishing of timbers, in a given case, where the facts are disputed, a proper jury question, but the fact of whether or not, after timbers are furnished and placed in the mine, they are properly and carefully placed, unless the evidence is all one way, is also an issue for the jury and has been so held, in Colorado.⁴

¹ Consolidated Coal Co. v. Lundak, 196 Ill. 594; 63 N. E. Rep. 1079.

² Himrod Coal Co. v. Clark, 197 Ill. 514; 64 N. E. Rep. 282. The issue of the defendant's negligence in maintaining unsafe timbering, in a mine in Pennsylvania, was held properly submitted to the jury, in Webster v. Con. Coal & Coke Co., 201 Pa. 278; 50 Atl. Rep. 964. The defense of contributory negligence and assumed risk, in a case in California, from injury by falling rock, was held properly submitted to jury, in Habishaw v. Standard Quicksilver Co., 181 Cal. 430; 63 Pac. Rep. 728.

³ Hammon v. Central Coal & Coke Co., 156 Mo. 232; 56 S. W. Rep. 1091..

⁴ Westland v. Gold Coin Mines Co., 101 Fed. Rep. 59; 41 C. C. A. 193. "A miner, employed to operate a machine and having nothing to do with the propping or timbering of the mine, was killed by a fall of the roof. There was evidence that the mine manager had been informed of

§ 115. **Whether defendant's negligence caused breaking of rope.** — In Oregon, it is held, in an action for an injury to a servant, caused by the breaking of an inch rope by which a heavy timber being lowered was let fall upon him, that it is proper to submit the issue of whether or not the defendant's negligence occasioned the injury, where the evidence showed that the rope came apart on the previous day, was old and had been subjected to a continuous strain for a long time and the master himself had superintended the work for some days.¹

§ 116. **Injury from breaking of iron handle.** — In a late Massachusetts case the plaintiff, an experienced coal driver, was injured by the breaking of an iron handle used to prop up the wagon bed in emptying the load of coal. He had used the handle which broke, as well as similar handles, but the handle which broke was welded at the place where the break occurred. There was nothing in its appearance to indicate that it was unsound and the evidence showed that the plaintiff was not familiar with the art of welding iron and his experience was not such as to enable him to determine that the handle would break when put to the usual strain of lifting a wagon loaded with coal. The

the dangerous condition of the roof about two days before the accident; one of the witnesses testifying that he discovered it, and pulled down loose pieces of rock, afterwards and before the accident demanding pay for the work from the manager. The manager denied having knowledge of the unsafe condition of the roof. *Held* sufficient to take the case to the jury on the issue of defendant's knowledge." *Himrod Coal Co. v. Clark*, 64 N. E. Rep. 282; 197 Ill. 514. "In an action brought under Hurd's Rev. St. 1899, p. 1174, § 33, to recover for the death of a miner, all got to have been caused by the falling of the roof in consequence of the willful failure of the mining company to furnish a sufficient supply of timbers for the purpose of securing it, the evidence examined, and *held* to require submission to the jury." *Donk Bros. Coal & Coke Co. v. Stroff*, 66 N. E. Rep. 29; 200 Ill. 488.

¹ *Galdard v. Marshall*, 73 Pac. Rep. 830.

court held that it was properly submitted to the jury to determine whether the plaintiff knew or ought to have known, from the appearance of the handle, that it was unsafe.¹

§ 117. **Warning of the plaintiff a jury question.** — Where the evidence is conflicting as to whether or not the plaintiff had been given a proper warning of the danger which he was about to encounter, and the necessity of such a warning to him under the circumstances of the case, the issue should be submitted to the jury the same as other disputed issues of fact. In Colorado, an employee was sleeping in a tent near where his co-employees were engaged in blasting, in making an excavation. He was injured by a rock being thrown into the air and falling through the roof of the tent where he was asleep. The evidence showed notice of his location to the defendant but was conflicting as to whether or not he had been properly notified and the jury was instructed that if such notice had been given him and he had ignored it he could not recover, but if not he was entitled to a verdict, and this was held proper.² The issue has also been held properly submitted to the jury in case of an injury to a boy fourteen years old, from riding cars and being kicked by a known vicious mule, whether his intelligence and appreciation of danger was such that it was negligence of the master not to have warned him thereof.³

¹ *Murphy v. Marston Coal Co.*, 183 Mass. 835; 67 N. E. Rep. 342.

² *Orman v. Salvo*, 117 Fed. Rep. 233; 54 C. C. A. 265.

³ *Bowyer v. Northern Pacific Coal Co.*, 27 Wash. 707; 68 Pac. Rep. 848. And where an employee is injured by a vicious mule and the evidence is disputed as to the safety of the mule, it is properly submitted to the jury to determine if the mule was safe or not. *East Jellico Coal Co. v. Stewart*, 24 K. L. R. 420; 68 S. W. Rep. 624. "Plaintiff, a boy thirteen years old, sued to recover for personal injuries sustained by his clothes being caught in a dangerous machine which he was operating. The evidence showed that the danger had not been explained to plaintiff,

§ 118. **Safety of place a jury question — Peremptory instruction regarding.** — Where the action of the plaintiff is based upon the violation of the employer's duty to provide a reasonably safe place, in which to work, as the question of the safety of the place, where the evidence is not all one way, and whether or not the place was reasonably safe, is one of fact, for the jury, a peremptory instruction that the place was, or was not in a reasonably safe condition, is usually improper, but the facts should be submitted to the jury and the conclusion should be left for them to decide, from the evidence, whether the place was, or was not, reasonably safe. In an Iowa case, where the injury was to a coal mine driver, from an overhanging rock, an instruction that the employer was not required to keep his entry-way of any specific height or width, is properly refused, as the question of a safe place

and that a shaft around which his clothes wrapped moved so rapidly that it gave it the appearance of being stationary, of which fact the boy was in ignorance. *Held*, that the question of negligence was for the jury." *Dynes v. Bromley*, 57 Atl. Rep. 1123; 208 Pa. 688. "In an action by a boy fourteen years old against a mining company for injuries, a verdict for the plaintiff will be sustained where it appears that, a month before the accident, plaintiff had been placed at work, without previous experience, in keeping coal moving in chutes; that this work, while dangerous, was not so obviously dangerous as to deter a prudent person from doing it; and that the evidence as to whether the plaintiff had been properly instructed was contradictory." *Brislin v. Kingston Coal Co.*, 20 Pa. Super. Ct. 234. "Where a servant employed as a shoveler on the dump of a quartz mill was put to work in a dangerous place in the mill, and required to perform labor on machinery with which he was not familiar, the questions whether the place was reasonably safe for moving machinery near at hand, whether the character of the work was such as to call for special instructions how to perform it, whether such instructions were given, whether the servant should have been cautioned as to the danger, whether guards were practicable or required as a protection against accident, whether other batteries should have been stopped while putting cams on the shaft of a battery not running, should have been submitted to the jury on the issue of negligence." *Merrifield v. Maryland Gold Quartz Min. Co.* (Cal. 1904), 76 Pac. Rep. 710.

to work, is for the jury, from all the facts and circumstances in evidence.¹ But if the facts in regard to the place where the employee was injured were not disputed, but were all one way, then there would not be an issue regarding such place, to submit to the jury, and the court, as a matter of law, should decide whether or not the place was, at the time of the injury, a reasonably safe place.²

§ 119. **Reasonableness, promulgation and enforcement of rule.** — Where the evidence is conflicting as to the reasonableness, promulgation and enforcement of a given rule, the questions are all properly submitted to the jury, the same as any other issue of fact, under proper instruction from the court, furnishing to them a proper guide as to what is a reasonable rule and what constitutes a proper promulgation thereof.³ But if a given rule is manifestly unreasonable or unjust, as one brought to the attention of an Illinois court, which required all employees to take upon themselves the risk of injury from violations of a statute passed for their benefit, it could and would be held to be

¹ *Hamilton v. Mendota Coal and Mining Co.*, 94 N. W. Rep. 282.

² *Wendall v. Chicago & Alton Co.*, 100 Mo. App. 556; 75 S. W. Rep. 689. In Tennessee, a plaintiff, injured by falling ore, from a car above him, where he was at work, was held entitled to have the safety of the place submitted to the jury, in *Virginia Iron, Coal & Coke Co. v. Hamilton*, 65 S. W. Rep. 401. The same rule was laid down in Vermont, in case of an injury to a talc miner, by falling ore from the roof. *Severance v. New England Talc Co.*, 75 Vt. 181; 47 Atl. Rep. 833. "In an action for injuries to a servant caused by a car falling from the tracks on an incline, evidence that at the place of the accident the rails were some three inches nearer together than the wheels of the car, and that four of the ties under one rail were not properly supported, was sufficient to warrant the jury in finding that defendant failed to provide a reasonably safe place for defendant to work." *Momence Stone Co. v. Turrell*, 68 N. E. Rep. 1078; 205 Ill. 515. Where the evidence is conflicting as to whether or not a miner injured by a falling roof in a mine, made his own place to work in the mine, or the company was bound to see that it was reasonably safe, it was a proper issue for the jury to decide. *Taylor v. Star Coal Co.* (Iowa, 1899), 81 N. W. Rep. 249.

³ *Devoe v. N. Y. Cent. Co.*, 174 N. Y. 1; 66 N. E. Rep. 568.

unreasonable, as a matter of law.¹ And in any case, where the evidence is not disputed on either of the issues named, the court would be justified in giving a peremptory instruction, according to the given facts in the case before the court.

§ 120. **Breaking of hook on cable, used to pull cars.** — In an Illinois case, the plaintiff, an employee in a quarry, was injured, owing to the breaking of a hook which was attached to a cable, and hooked to cars of stone, which, by means of the cable, were drawn up an inclined track. The employee who found the broken hook, testified that the break showed that it was rusty; that it was an old break and there was a clearly defined flaw in the iron and the court held that the trial court had properly submitted the issue to the jury as to whether or not the hook was defective and the defendant knew, or by reasonable diligence ought to have known, of the defect.²

§ 121. **Issue as to proper construction of derrick.** — Where the cause of action is the alleged improper construc-

¹ See, also, *Island Coal Co. v. Swaggerty*, 159 Ind. 664; 65 N. E. Rep. 1226. The judgment of the jury is made the test of the reasonableness of the master's rules, in Pennsylvania, in the late case of *Bethlehem Iron Co. v. Weiss*, 100 Fed. Rep. 45; 40 C. C. A. 270.

² *Momence Stone Co. v. Groves*, 197 Ill. 88; 64 N. E. Rep. 385. Where an employee was injured by the bending of a hook, used to draw buckets, on a canal, there was evidence that the hook had been used for some time and had never bent before and evidence for the plaintiff that it was too small for the use to which it was put, it was held proper to submit the issue of plaintiff's assumption of risk and contributory negligence to the jury. *Colleman v. Dunfee*, 69 N. Y. S. 261; 59 App. Div. 467. "The selection of a hook to use in moving a water tank was made by a servant under the immediate direction of the hook tender. The tank contained a large amount of water, and, from its position, it was necessary for it to blow its way through a mound of earth and roots. Held, that the question whether there was negligence in the use of the hook was for the jury." *Bailey v. Cascade Co.* (Wash. 1903), 73 Pac. Rep. 385. "Plaintiff, employed in a quarry, was injured, owing to the breaking of a hook which was attached to a cable and hooked into cars of stone which

tion of a derrick upon which the plaintiff was injured, if the evidence is disputed upon the question as to whether or not the derrick was properly made, it is, as in every other issue of fact, where the evidence is disputed, a question to be submitted to the jury. In a New York case, a derrick was built in such a manner that in operating it, it was essential to remove a large portion of its supports, and its safety, with such supports out, depended largely upon the watchfulness and care of a fellow-servant of the injured employee. The evidence for the plaintiff, who was injured by a collapse of the structure, tended to show that the construction was improper and it was held to be an issue of fact for the jury whether or not the derrick was properly built, notwithstanding the concurrent negligence of the co-employee engaged to watch the same.¹

§ 122. Injury from slipping of earth and gravel bank. — In an Illinois case, the plaintiff, who was engaged

were by means of the cable drawn up an inclined track. In an action for the injuries, the employee who picked up the broken pieces of the hook testified that there was a visible flaw in it, that he could see where it had been broken, and that it was an old break and rusty. *Held*, that the question whether the hook was defective, and whether defendant knew or ought to have known such fact, was for the jury." *Momence Stone Co. v. Groves*, 64 N. E. Rep. 335; 197 Ill. 88.

¹ *Walters v. Fuller Co*, 77 N. Y. S. 681; 74 App. Div. 388. The issues as to whether he had tried to raise too large a stone and put it to an improper use, were held proper jury questions, in Minnesota, in *Attix v. Minnesota Sandstone Co.*, 85 Minn. 142; 88 N. W. Rep. 436. "Evidence in an action to recover damages for the death of an employee by the fall of a scaffolding on which he worked reviewed, and *held* sufficient to take the case to the jury on the question of defendant's negligence." *Geist v. Rapp*, 55 Atl. Rep. 1063; 206 Pa. 411. "Plaintiff discovered a defect in the scaffold on which he was to work, and called the attention of the proper person thereto, who promised to repair it. *Held*, that whether plaintiff was guilty of contributory negligence in going on the scaffold without knowing whether it had been repaired was for the jury." *Hempstock v. Lackawanna Iron & Steel Co.*, 90 N. Y. S. 668; 98 App. Div. 332.

in working at the bottom of a quarry, was injured by earth and gravel slipping from the bank above him, falling upon him, while at work. Some of his witnesses had observed a crack in the bank on the morning of the accident and had examined it and thought that it was unsafe and the plaintiff, himself an experienced quarryman, looked at the bank but saw no defects about it. There was a dispute in the evidence as to the fact of an inspection by the foreman of the defendant, but it was established that the defendant had knowledge of the rain, the night before, and the liability of the bank to slide, and it was held proper to submit the question to the jury as to whether or not the plaintiff assumed the risk from the falling of the gravel bank.¹

§ 123. Issue as to foul air and presence of gas. — Where the ground of complaint, in a case for personal injuries, is the presence of foul air or gas, as a result of which the injury is sustained, if the evidence is conflicting as to the extent and nature of the poisonous gas, or the cause of the injury, it should be submitted to the jury. In a Colorado case, the plaintiff, who was climbing up the cross stulls in an upraise, with a co-employee, who was above him, was overcome by powder smoke, foul air and gas, and fell, striking the plaintiff, knocking him down and causing him to fall and receive the injury complained of. The evidence showed that the upraise was impregnated with foul air, which was very debilitating and weakening and that this weakness often came on very suddenly; that the

¹ *Western Stone Co v. Muscia*¹, 196 Ill. 382; 63 N. E. Rep. 664. This case is deemed opposed to the great weight of authority upon this question. The servant is held to assume risk from falling banks and rocks, when he has knowledge of the conditions existing and all men are charged with a knowledge of the operation of familiar natural laws, such as gravitation. See *White Mines and Mining Remedies*, Sec. 450, p. 595 and cases cited.

plaintiff was taken with this weakness suddenly and then was struck by his co-employee, falling against him and that both were found in the bottom of the mine, the fellow-servant dead and the plaintiff badly injured. The court held that the issues as to the presence and effect of the foul air and the negligence in permitting it to accumulate, were properly submitted to the jury and that a verdict for the plaintiff was supported by the evidence.¹

§ 124. **Failure to discover unexploded blast.**— The rule is differently applied, in the different mining States, as to the duty on the part of the employer to discover and notify an employee of an unexploded blast, it being held in some that such a duty exists upon the employer's part and in others that the danger of an unexploded blast is a risk incident to the employment, for which the master is not responsible. In Missouri, in a recent well considered case, the employer is held not liable for an injury to an employee from drilling into an unexploded charge of dynamite, the court holding that it was a duty of the drillman to discover and guard against such dangers.² But in a late Alabama case, where an employee who had only been employed for a week, was injured by causing an explosion in drilling into a rock, that he was directed to drill a hole in, the mere absence of knowledge of the unexploded shot, on the part of the defendant's foreman, was held not to entitle the defendant to a peremptory direction of the verdict, but it was held a proper issue, to be submitted to the jury, whether or not, in the exercise of due or ordinary care, the defendant ought to have discovered such unexploded shot.³

¹ *Portland Gold Mining Co. v. Flaherty*, 111 Fed. Rep. 312; 49 C. C. A. 361.

² *Livengood v. Joplin Mining Co.*, 179 Mo. 240; 77 S. W. Rep. 1077.

³ *Robinson Mining Co. v. Tolbert*, 31 So. Rep. 519. Speaking of the liability of the defendant in that case, the Supreme Court of Missouri said: "The business was necessarily attendant with some risk and danger

§ 125. **Shifting of belt, under foreman's order.** — In an action by an employee for an injury received while fitting a defective belt on a rapidly revolving pulley, where the plaintiff testifies that he was adjusting the belt under the order of the foreman and that he was ignorant of any danger, it was held, in Illinois, that the employee could not be held, as a matter of law, to have assumed the risk of injury from the adjustment of the pulley, as he could not be held to have assumed the risk, while acting under the defendant's orders, unless guilty of recklessness and the issue as to his recklessness in such case, was held to be a jury issue.¹

§ 126. **Safety of appliance causing injury.** — It is a question for the jury to determine, from the evidence in the case, whether or not an appliance furnished by the employer, which occasions the injury complained of, was or was not reasonably safe for use, in the business for which it was intended.² This rule has been applied where the evidence was conflicting, as to a defective handle in a sledge hammer,³ also as to the sufficiency of the hammer

but it could be done in a comparatively safe manner, or it could be done in a negligent manner. The injury resulted, in this case, not from the failure of the master to discharge his duty to furnish the servant with a reasonably safe place and reasonably safe tools and appliances with which to do the work, but from the manner in which the work was done. There is no conflict in the testimony that it was a part of the duty of the drillman, Wilkie, to examine and ascertain, after every shot, whether all the shots had exploded. It is not a scientific matter to ascertain whether any of the charges in any of the holes, remained unexploded, after the shots had been fired. There is no reason, in law, why the ascertainment of this simple fact cannot be as well and safely performed, by the servant, as *the drilling of the hole and the charging it with dynamite, can be performed by the servant.*" *Livengood v. Lead Co.*, 179 Mo., loc. cit. 240.

¹ *Gundlach v. Schott*, 192 Ill. 509; 61 N. E. Rep. 832.

² *Maxwell v. Zdariski*, 93 Ill. App. 334.

³ "In an action for injuries to an employee, caused by spalls of rock flying from under the stroke of a sledge hammer, the handles of which were defective, evidence considered and held to present a question for

itself;¹ as to the proper use of appliances for stopping ore cars,² and, generally, the rule is enforced as to all appliances, occasioning injury to an employee, whenever there is substantial evidence of a defective or insufficient appliance which the master, by reasonable care, could have discovered and remedied.³

§ 127. **Upon failure to inspect mine.** — As in the case of other issues, in the trial of personal injury actions, if the basis of the plaintiff's right of recovery is a failure to inspect the mine, unless the evidence upon this issue is all one way, it should be submitted to the jury to determine whether or not an inspection was or was not made and if made, if it was a proper and competent inspection.⁴ In a recent Missouri case, an employee was killed, caused by the

the jury, whether the injury was caused by the master's negligence in failing to furnish suitable handles for the sledge hammer used by a fellow-servant, or whether plaintiff was guilty of contributory negligence in continuing in the service." *Nash v. Dowling*, 98 Mo. App. 156.

¹ "Where it appeared, in an action by an employee for personal injuries, resulting in the loss of an eye, from a piece of iron breaking off a hammer he was using in his work, that the condition of the hammer was known to the employer, the question whether it was a reasonably safe implement to be used, in the exercise of due care, was for the jury." *Robbins v. Big Circle Min. Co.* (Mo. App. 1904), 79 S. W. Rep. 480.

² "In an action for the death of a servant employed in a blast furnace owing to the alleged negligence of defendant in not furnishing sufficient timbers to chock cars which were run on an inclined track and allowed to stand there for a time, evidence held sufficient to render it a question for the jury whether the use of a chock that was too short was the cause of the death." *Gloss-Sheffield Steel & Iron Co. v. Mobley* (Ala. 1904), 36 So. Rep. 181.

³ "An employer's negligence in failing to furnish his employee with a safe appliance may be shown by direct evidence, or by evidence from which negligence is inferable; and, when once shown by substantial testimony, its weight and sufficiency are for the jury." *Towle v. Stimson Mill Co.* (Wash. 1903), 74 Pac. Rep. 471.

⁴ *White Mines & Mining Remedies*, Sec. 458 and cases cited.

falling of a rock in the roof of the mine where he was at work. It was shown that it was the duty of certain other employees, called "inspectors," to examine the mine and that it was also deceased's duty, as a driller, to examine the roof in the vicinity of his drill before setting it up. The rock which killed him fell from a distance of ten or twelve feet from his drill and it was held to be a question for the jury to determine, from all the evidence in the case, whether or not a proper inspection by the deceased, within the limits of the roof he was bound to inspect, would have disclosed its dangerous condition, so that a failure to discover it would constitute contributory negligence on his part.¹

§ 128. **Jury issues in injuries from hoisting appliances.** — The question of whether or not a hoist, in a perpendicular shaft of the defendant, was caused to be negligently and suddenly started, without warning to the plaintiff, has been held, in Illinois, to be a question of fact for the jury.² Where the deceased and his fellow-workman about to ignite a charge of dynamite, signaled to the hoister-man and he answered their signal, by raising and lowering the bucket attached to the rope and they then ignited the fuse and signaled to hoist and the hoister failed to work, it was held to be properly a jury question whether or not the deceased and his co-employee were guilty of contributory negligence in failing to properly place a chain ladder to ascend on, in case the hoister should get out of fix.³ And where the plaintiff was injured while being rapidly lowered into a shaft and the witnesses differed as to the existence of a custom to let the bucket down

¹ *Fisher v. Central Lead Co.*, 156 Mo. 479; 56 S. W. Rep. 1107.

² *Duffy v. Kivilln*, 98 Ill. App. 483; 63 N. E. Rep. 508.

³ *Alaska United Gold Mining Co. v. Muset*, 114 Fed. Rep. 66; 52 C. C. A. 14.

empty to ascertain the presence of obstructions caused by the blasts, it was held properly submitted to the jury whether the sending of a bucket down on a trial trip, before sending the men down in the mine, after a blast, was a necessary precaution for their protection, or otherwise.¹

§ 129. **Other instances of jury cases.**—In a recent California case, where the injury was to a shoveller, put to work on a dump at a quartz mill, in a dangerous place, near machinery, the questions of whether or not the place was reasonably safe, whether special instructions should have been given, whether guards were practical, or should have been required, and whether or not other batteries should have been stopped, while putting cams on the batteries not running, were all held to be questions of fact, for the jury.² So, it has been held to be a jury question, whether or not the employer knew or ought to have known of a defective coal chute floor;³ whether or not a foreman was negligent in giving a particular order;⁴ whether or not, in the exercise of due care, the plaintiff

¹ *Alaska United Gold Mining Co. v. Keating*, 116 Fed. Rep. 561. "While plaintiff was being rapidly lowered to his place of work in defendant's mine, the bucket came in contact with an obstruction which a fellow-servant had negligently left across the shaft, and plaintiff was injured. A number of witnesses testified that because of the danger of obstructions and displaced timbers caused by blasting operations it was the custom in many mines to send the empty bucket down the shaft to ascertain that it was clear of obstructions before sending the workmen down. *Held*, that it was not error to submit to the jury the question whether sending the bucket on a trial trip was a necessary precaution for the safety of the men before sending them down to their place of employment." *Alaska United Gold Min. Co. v. Keating* (U. S. C. C. A., Alaska, 1902), 116 Fed. Rep. 561.

² *Merrifield v. Maryland Gold Quartz Mining Co.*, 143 Cal. 54; 76 Pac. Rep. 710.

³ *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185.

⁴ *Republic Iron & Steel Co. v. Berkes*, 162 Ind. 517; 70 N. E. Rep. 815.

should have known of an unexploded charge of dynamite;¹ the issue as to whether or not a given appliance in use was one reasonably safe and proper for the work;² whether reasonable rules should have been required and, if so, the due promulgation thereof, by the employer;³ whether the employer's methods were reasonably safe, or not;⁴ the necessity for a given warning;⁵ where the facts, upon the question of fellow-servants, or vice-principals, are contradictory or in dispute;⁶ whether an employee should be chargeable, in law, with notice of a given danger;⁷ whether the experience of the employee was sufficient to subject him to the rule of assumed risk;⁸ and whether or not a crevice in a boulder, in the roof of a mine, was sufficient to charge an employee with contributory negligence,⁹ in continuing to work under it, are all held to be jury questions.

¹ *Lanza v. LeGrand Quarry Co.* (Iowa, 1904), 100 N. W. Rep. 488.

² *Robbins v. Big Circle Mining Co.*, 105 Mo. App. 78; 79 S. W. Rep. 480. But see, *Shaw v. New Year Gold Mining Co.* (Mont. 1904), 77 Pac. Rep. 515.

³ *Johnson v. Union Pacific Coal Co.* (Utah, 1904), 76 Pac. Rep. 1089.

⁴ *Johnson v. U. P. Coal Co.*, *supra*.

⁵ *Moyes v. Ogden Clay Co.* (Utah, 1904), 77 Pac. Rep. 610.

⁶ *Spring Valley Coal Co. v. Patting*, 210 Ill. 342; 112 Ill. App. 4; 71 N. E. Rep. 371; *Consolidated Coal Co. v. Fleishbein*, 109 Ill. App. 74; 69 N. E. Rep. 963; *Junction Mining Co. v. Goodwin*, 109 Ill. App. 144.

⁷ *Merrifield v. Maryland Gold Quartz Mining Co.*, 143 Cal. 54; 76 Pac. Rep. 710; *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185; *Riverton Coal Co. v. Shepard*, 111 Ill. App. 294.

⁸ *Carter v. Baldwin*, 81 S. W. Rep. 204; *Schermerhorn v. Portland Cement Co.*, 88 N. Y. S. 407; 94 App. Div. 600; *Moyes v. Ogden Clay Co.* (Utah, 1904), 77 Pac. Rep. 610.

⁹ *Carter v. Baldwin*, 81 S. W. Rep. 204.

CHAPTER VII.

QUESTIONS OF LAW, FOR THE COURT.

- SECTION 130. Failure to establish ground of negligence alleged.**
131 Defendant's negligence — Avoidance of injury — Direction of verdict.
132. Injury by fellow-servant — Undisputed evidence.
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144. Injury from set screw — Assumed as matter of law.
145. When safety of place a question of law.
146. Employment or retention of incompetent employees.
147. Failure to call for props — Knowledge of conditions.

§ 130. **Failure to establish ground of negligence alleged.** — In an action for negligence, the right of the plaintiff to recover depends entirely upon his ability to establish the specific ground of negligence alleged as the approximate cause of the injury complained of. The defendant is not called upon to answer for any other act or neglect except that alleged in the petition and a failure to prove the negligence alleged as a ground of recovery, will justify a peremptory instruction to find for the defendant. In a Kansas case, the negligence alleged in the petition was that a stack of lead, out of which a bar fell and injured the plaintiff, was negligently built. There was a total

failure of evidence that it was negligently built or that the bar fell because of the negligence of the defendant, and it was held proper to charge the jury to return a verdict for the defendant.¹ And where the ground of negligence alleged as the approximate cause of the decedent's death was a defective appliance and all the evidence showed that the appliance was working in good condition, with the exception of the rope used in connection therewith, the sufficiency of the appliance is not then a matter in issue and it is error to submit such question to the jury.²

§ 131. Defendant's negligence — Avoidance of injury — Direction of verdict. — The general rule of pleading that the burden of proof is always upon the party who alleges the affirmative of a proposition, to establish it by

¹ *Kansas City Smelting & Refining Co. v. Allen*, 67 Pac. Rep. 486.

² *Hunt v. Kille*, 98 Fed. Rep. 49; 38 C. C. A. 41. "In an action against a mine owner for injuries to a miner caused by an explosion, evidence held not to justify submission of the issue of defendant's negligence." *Shaw v. New Year Gold Mines Co.* (Mont. 1904), 77 Pac. Rep. 515. "Proof that a party injured in a mine proceeded to the shaft to give an order, not by reason of any direction from the superintendent, will not sustain a recovery on a declaration alleging that the superintendent gave him the order to do what he did." *Cardiff Coal Co. v. Wayback*, 108 Ill. App. 561. "Where a laborer is injured by the falling of a stack of zinc spelter, he cannot recover in the absence of evidence that it was carelessly built, or that his employer knew that it was dangerous." *Lanyon Zinc Co. v. Bell* (Kan. 1902), 68 Pac. Rep. 609. "Where in an action by a servant for injuries, the negligence alleged is that defendant furnished an appliance insufficient for the purpose for which it was used, and that it was made of cast steel instead of malleable iron, the plaintiff fails to make a prima facie case without evidence that it was so made." *Breeden v. Big Circle Min. Co.* (Mo. App. 1903), 76 S. W. Rep. 731. Where the ground of negligence alleged, was a failure to warn the employee of the dangers of the service, if the evidence shows an injury from a defective appliance, a nonsuit is properly directed. *Moyer v. Ramsey-Brisbane Stone Co.*, 119 Ga. 734; 46 S. E. Rep. 844.

competent evidence, applies to the plaintiff in a personal injury action to the extent of requiring legal and competent evidence to establish, not only the fact that the negligence of the defendant was the approximate cause of the injury, but that, by the exercise of reasonable care and caution, on his part, the plaintiff could not have avoided the injury. And in an action for the injury or death of an employee, where there is no evidence of negligence on the part of the defendant, or that the employee, by the exercise of ordinary care and caution, could not have avoided injury, a nonsuit is properly directed by the trial court.¹ In a New York case, the plaintiff's intestate, with a large number of other men, was employed in getting out stone in a quarry, and a rock, which had probably been loosened by a previous blast fell on him, causing injuries, from which he died. The evidence did not show a lack of due care, on the part of the defendant, and if there was any negligence in the case it was that of the plaintiff and his co-employees and it was held that a verdict was properly directed for the defendant.²

§ 132. Injury by fellow-servant — Undisputed evidence.—In the absence of statute changing the salutary rule of the common law, that an employee, assumes, by virtue of his contract of employment, the risk of injury from the negligence of his co-employees, where the undisputed evidence shows that the relation of fellow-servant exists between the plaintiff and the employee causing his injury, the question of the defendant's negligence then becomes one of law, for the court, and a peremptory in-

¹ *Roul v. Palmer Brick Co.*, 114 Ga. 910; 41 S. E. Rep. 40.

² *Trapasso v. Coleman*, 76 N. Y. S. 798; 74 App. Div. 33. That machinery is dangerous will not render a master liable, if he is not negligent. *Johnson v. Coal Co.*, 183 Pa. 623; 39 Atl. Rep. 10; *Magnum v. Bullion Beck Co.*, 15 Utah, 534; 50 Pac. Rep. 884.

struction should be given to find for the defendant.¹ This is the rule in every jurisdiction where the fellow-servant doctrine obtains, although it is differently stated, as, in Illinois, that "where the undisputed evidence is such that all reasonable minds must agree that the relation of fellow-servant exists the existence of such relation becomes a question of law."² This is no exception to the general rule of practice, for in every case, where there is no dispute as to an issue which is decisive of the case, instead of going through the useless formula of submitting an issue that does not exist, to the jury, the court will always direct the verdict in accordance with the undisputed evidence going to establish the existence or non-existence of a given basic fact, decisive of the case being tried.

§ 133. Defendant negligent as matter of law.— When the evidence, although all one way, so far as the defendant's negligence is concerned, is susceptible of more than

¹ *Duffy v. Kivilin*, 98 Ill. App. 488; 68 N. E. Rep. 503; *MacCarthy v. Whitcomb*, 110 Wis. 113; 85 N. W. Rep. 707; *Yates v. Iron Co.*, 69 Md. 370; 16 Atl. Rep. 280.

² *Ashmore v. Charleston L. H. & P. Co.*, 99 Ill. App. 262. In a recent case in California, where an employee in a quarry, was injured by a premature explosion of a blast, through the negligence of the foreman, the relation of the foreman to the plaintiff was held to be a question of law for the court. *Donovan v. Ferris*, 128 Cal. 28; 60 Pac. Rep. 519. "Where the essential facts for determining who are fellow-servants are not in controversy, the question is one of law." *Shaw v. Bambrick-Bates Const. Co.* (Mo. App. 1903), 77 S. W. Rep. 96. "Where in an action for injuries to a servant, all the facts were conceded, and all reasonable men would agree from the evidence and the legitimate conclusions to be drawn therefrom that the relation of fellow-servant existed, the question was one of law, and not of fact for the jury." *Stevens v. Deatherage Co.*, 86 S. W. Rep. 481. "While the question of whether servants of a common master are fellow-servants is usually one of fact for the jury, yet, when the facts are conceded, or there is no dispute with reference thereto, and all reasonable minds will agree that the relation of fellow-servants does or does not exist, then the question is one of law." *Coal Co. v. Patting* (Ill.), 71 N. E. Rep. 371

one construction, since every one is presumed to properly discharge his duty, the court could not, as a matter of law, predicate negligence as characterizing such conduct on the employer's part, but the issue, as to the breach of duty on the defendant's part, toward the plaintiff, should be submitted to the triers of the facts. Where, however, from all the evidence in the case, no two reasonable men could differ as to the conclusion that the defendant was guilty of a breach of duty toward the plaintiff, then the court would be justified in so holding, and it would be proper to refuse to submit to the jury the question of the employer's freedom from blame.¹ Numerous instances of such liability are to be found in the reported cases on violations of the statutes for the safety and inspection of mines,² of statutes against the employment of children under fixed age,³ and the different acts requiring the ventilation⁴ and inspection⁵ of mines.

¹ *Union Coal Mining Co. v. Crawford* (Colo. 1908), 69 Pac. Rep. 600; *Alaska United Gold Mining Co. v. Muset* (U. S. C. C. A. Alaska, 1902), 114 Fed. Rep. 66.

² See chapter, *Statutes Regarding Safety of Mines*.

³ See chapter, *Injuries to Infants in Mines*.

⁴ See chapter, *Gas Explosions in Mines*.

⁵ See Chapter *Injuries from Failure to Inspect*. "A failure on the part of the proprietor of a coal mine to comply with Hurd's Rev. St. 1901, p. 1216, § 21, requiring places of refuge on all gravity or inclined entries in his mine, renders him liable for injuries received by reason of such failure." *Brookside Coal Min. Co. v. Hajnal*, 101 Ill. App. 175. "Plaintiff's intestate and another were employed in defendant's mine at the bottom of a shaft. There was an elevator in the shaft, and when about to blast they gave a certain signal to the engineer, who signified that he understood by raising a bucket a few feet and then lowering it. They then ignited the fuse, and signaled the engineer to hoist, and were raised a short distance, and then lowered, and the engineer shouted down the shaft that the compressed air by which the elevator was operated was cut off. Deceased's companion climbed up the elevator rope and escaped, but deceased could not do so, and was killed by the explosion. The air was cut off by the foreman, who had full charge of the operation of the mine. There had been an iron ladder in the shaft, which

§ 134. When evidence shows defendant's freedom from negligence. — When all the evidence in a suit for personal injuries, not only fails to show the specific grounds of negligence alleged as a basis for the liability on the defendant's part, but giving every reasonable inference to the facts established, which the most favorable construction thereof would warrant, there is shown to be a freedom from all negligence on the defendant's part, then the court as a matter of law, would be warranted in giving a peremptory instruction to find for the defendant.¹ This result,

was removed some weeks before the accident to be replaced by a new chain ladder, which was on the ground, and was to be placed in the shaft that day. *Held*, that defendant was negligent in failing to provide adequate means of escape for the men engaged in the blasting." *Alaska United Gold Min. Co. v. Muset* (U. S. C. C. A., Alaska, 1902), 114 Fed. Rep. 66. "The construction, in an upper level of a mine, of an ore tramway on such a grade that cars started thereon, or starting by gravity, will run into the shaft by their own momentum, without providing sufficient barriers to prevent their falling down the shaft, is negligence." *Union Gold Min. Co. v. Crawford* (Colo. 1902), 69 Pac. Rep. 600. A failure to properly secure, by cleats, a platform, over which miners are required to carry coal, as a result of which it fell and injured one of such miners, is negligence sufficient to constitute a cause of action. *Monongahela River Con. Coal & Coke Co. v. Campbell*, 25 Ky. L. R. 1599; 78 S. W. Rep. 405. A post, near a coal chute, so near as to strike passing cars, is such a defect as to render the master liable, in case of a resulting injury therefrom. *Day v. Dominion Iron and Stone Co.* (Can.), 86 N. S. 118.

¹ "Great care was taken by defendants in procuring good ropes. The rope which broke had been tested before it was put in use, and the load when it broke was small compared to the ordinary carrying power of such a rope. The cause of the breaking of the rope was not known, but it had been used but a short time compared with the time such a rope could ordinarily be used with safety. *Held* to show freedom from negligence as a matter of law." *Kelley v. Hogan*, 76 N. Y. S. 918. "An employer's failure to inspect stone, after it is delivered from the quarry, to ascertain if any explosives are left about it, will not warrant a finding of negligence, in an action by a servant for injuries by explosion, in not using reasonable care in the selection of suitable material for the work, where such inspections were always made at the quarry, and were rarely made after the stone was delivered." *Mooney v. Beattie*,

from the nature of the case, may either arise because of a failure to establish a relation from which any duty would spring, toward the plaintiff, on the defendant's part, or be owing to an absence of negligence, or a failure to connect such negligence with the injury of the plaintiff, but in either event the conclusion is the same and the defendant is not liable and there is nothing to submit to a jury.¹

(Mass. 1902), 62 N. E. Rep. 725. "Evidence merely that ventilating fans were not run day and night in a coal mine, where an explosion of gas occurred, killing a miner, does not show negligence of the owners which caused the accident; gas being found in the mine at intervals only, when a fall occurred or a clay vein was struck, except in the abandoned rooms, where workmen were forbidden to go, and the running of the fans not being effective unless the course of the air currents within the mine had been properly directed, which is a matter committed by statute to one over whom the mine owners have no control, and for whose neglect they are not answerable. "Hall v. Simpson (Pa. 1902), 52 Atl. Rep. 4.

¹ "Part of the passageway constituting the second floor of defendant's engine room had been removed to make room for machinery. The open space thus made was partly spanned by a plank, and a laborer attempting to cross over the plank was injured by its slipping and precipitating him to the floor below. *Held*, that the fact that the plank had been in use for two days, and that defendant might have discovered it with due care, did not make it liable; it not having furnished the plank in the first instance." *McKean v. Colorado Fuel & Iron Co.* (Colo. App. 1903), 71 Pac. Rep. 425. "A kettle-shaped ladle was used to convey molten metal. It became clogged with skull and slag, requiring it to be sent to the repair shop to be cleaned. After the ladle had been filled with water, as was customary to cool them, it suddenly exploded, killing plaintiff's intestate. It was not shown that there was any molten metal under the slag, or that the ladle was in any other than the usual condition in which ladles came to the repair shop. The same course was pursued with the ladle in question as had been followed with others in preparing them to be scraped, and none had ever exploded. *Held*, that a verdict for plaintiff could not be sustained on the presumption that the slag had formed a crust which held the metal under it and protected it from the water while the ladle was being filed, and that when the ladle was tipped to let the water run out the weight of the molten iron broke through the crust of the slag, dropped into the water, and caused the explosion." *Illinois Steel Co. v. Byczynski*, 106 Ill. App. 331.

§ 135. **Evidence showing want of contributory negligence.** — As the facts, when undisputed, may show such an absence of precaution for one's own safety, as to justify a court, as a matter of law, in holding the plaintiff guilty of such contributory negligence as will bar his recovery for a resulting injury, so all the evidence in a case may present such a case of due care and caution, upon the part of an injured employee, as to justify the court in holding that the plaintiff is not guilty of contributory negligence as a matter of law,¹ although the general rule is that if reasonable men would be inclined to differ as to whether or not negligence could be said to characterize the conduct of the plaintiff, it is proper to submit such issue to the jury.²

§ 136. **Injury due to contributory negligence of plaintiff.** — While the rule is quite general that the court will not, as a matter of law, interfere, by a peremptory instruction, on the ground of the contributory negligence of the plaintiff, unless the evidence shows such a case of negligence on the plaintiff's part as would clearly justify the conclusion that the injury to the plaintiff, instead of being due to the defendant's negligence, was caused, primarily, by the contributory negligence of the plaintiff,³ where the most favorable light in which the evidence can be regarded, shows a case where reasonable men would all agree as to the cause of the injury and that it was due to the negligence of the plaintiff himself, then the court, as a matter of law, is authorized in denying the plaintiff a recovery, and a court

¹ "A cager in a coal mine, who is required to work with great rapidity, and who steps on a cage to adjust a car which he is loading instead of running around the shaft by the 'traveling way' to head the car off on the opposite side, and who is injured by the premature hoisting of the cage, is not guilty of contributory negligence." *Princeton Coal & Mining Co. v. Roll*, 56 N. E. Rep. 169.

² See chapter, *Issues Properly Submitted to Jury*.

³ See chapter, *Contributory Negligence of the Miner*.

desirous of following the law, in such a case, should not wait for a motion for a new trial to declare the legal status of the parties, but ought to deny the right of a recovery as soon as the evidence in the case is closed.¹

¹ "A miner of long experience, who, with knowledge of an overhanging rock, continued to work thereunder for ten or fifteen hours, augmenting the danger by undermining the support of the rock, and finally causing its fall, was guilty of contributory negligence." *Heald v. Wallace* (Tenn. 1902), 71 S. W. Rep. 80. "Plaintiff was employed in defendant's coal mine to remove the dirt while another workman bored under the vein of coal in order that it might be broken by blasting from above. The person employed to do the blasting drilled holes into the vein further than it had been undermined, so that, when the blast was exploded, it left some coal partially detached from the vein. With knowledge of this condition of the vein, plaintiff's companion (an inexperienced employee) proceeded to undermine the vein as usual, until the loose coal gave way, injuring plaintiff. *Held* negligence, as matter of law." *Tradewater Coal Co. v. Johnson* (Ky. 1903), 72 S. W. Rep. 274; 24 Ky. Law Rep. 1777. "Plaintiff, an experienced practical miner, was injured while he was engaged in constructing an inclined raise in defendant's mine. On the day before the accident he blasted over the center of the raise, but did not go back to see the effect of the blast, it not being his duty to do so. In passing a ledge of rock on the side of the raise, he sounded it, and, finding it solid, did not brace it. Next morning, on returning to work, he found the face of the raise, including the ledge, entirely hidden by 'lagging,' the invariable custom, which was known to him, being to 'lag' under ground blasted or about to be blasted. He saw that there had been blasting and drilling on the center of the raise, and knew he was the first man in after the night shift, but he did not examine the ledge further than to give it a side glance, and to notice that there was some dirt on the 'lagging' under it. Its face hung too low for him to see it without stooping, but he thought it was safe, as it had not been braced by the night shift. In order to fix some 'lagging,' he got under the ledge, which, having been drilled by the night shift, and thus weakened, fell on him. *Held* that, being charged with notice of the 'lagging' and the conditions surrounding him that the ledge had either been blasted or drilled, plaintiff was guilty of contributory negligence in getting under it without first examining it." *Cummings v. Helena & L. Smelting & Reduction Co.* (Mont. 1902), 68 Pac. Rep. 852. "An employee sent into a room in a coal mine to remove from a car track slate which had fallen from the roof, knocked out a prop of the roof to get the slate by it, made no attempt to replace the prop, and made no examination of the roof, though it was low, and he had a lamp in

§ 137. **Injury from gas explosion, due to lighting match.**—An employee who knows that a mine contains gas, who is so far neglectful of his own safety, as to light a match in the mine, whereby an explosion results, is guilty of such contributory negligence, as a matter of law, as will prevent a recovery by him for the resulting injury.¹ And if the gas had accumulated in fifteen minutes after an examination of the mine, this would be such an unusual condition, regardless of the question of his contributory negligence, as would prevent a recovery from the employer.²

§ 138. **Selecting more dangerous way—Rope and ladder.**—The cases are of an infinite variety where the selecting of the more dangerous of two ways to perform his work, is held negligence, as a matter of law, in case of an injury to an employee. In a recent California case, where both a ladder and a rope were provided in a mine for employees to ascend and descend into the mine and the ladder was admitted to be the safer course to follow, an employee injured by reason of the fact that the brake on the hoister failed to work, was held not entitled to recover,

his cap, and soon after slate fell where the prop had been, and injured him. *Held*, that he was guilty of contributory negligence." *L. T. Dickason Coal Co. v. Peach* (Ind. App. 1903), 69 N. E. Rep. 189. "Plaintiff and another were driving a heading in defendant's mine, and were charged with the duty of pulling down or timbering up loose rocks. After driving the heading several feet and timbering up one rock, they drove it a few feet past the timbering, thus partly uncovering another rock. Plaintiff was then ordered to cut off a corner several feet short of the last rock, and his fellow worker continued to drive the heading, thus further uncovering the rock, and, while plaintiff was passing under it to get a sledge for his fellow worker, it fell and injured him. *Held*, that it was as much plaintiff's duty as that of his fellow worker to see that the rock was safe, and in failing to perform such duty he was guilty of such negligence as would preclude a recovery." *Pioneer Min. & Mfg. Co. v. Thomas* (Ala. 1902), 32 So. Rep. 15.

¹ *Sommers v. Carbon Hill Coal Co.*, 91 Fed. Rep. 337.

² *Sommers v. Carbon Hill Co.*, *supra*.

as he should have used the ladder and thus avoided the injury, instead of trying to ascend from the mine by the hoister and rope.¹

§ 139. **Assumption of known or obvious risks.** — Where the danger to which an employee is subjected is obvious and such that if the employee had used reasonable care to observe his surroundings, he would have discovered, his ability to have known and appreciated the risk will be taken, in law, as equivalent to actual knowledge thereof, whether in fact the employee saw or appreciated the danger or not, and the court, if from the nature of the danger, the master had a right to conclude that a sight of the appliance would carry with it a knowledge of the danger, has a perfect right to conclude that the servant would appreciate what was plain to be seen, and the danger would be held a risk assumed by the employee as a matter of law and the liability of the master would not be affected by the knowledge or want of knowledge on the part of the servant, since his responsibility is fixed as a matter of law in such a case.²

¹ *Gribben v. Yellow Aster Mining & Milling Co.*, 142 Cal. 248; 75 Pac. Rep. 839.

² *Bailey's Mas. Liab. Inj. Serv.*, p. 191. "Where plaintiff, who was an intelligent man, and had often performed the same labor before, was working in close proximity to a rapidly revolving shaft, which was in plain view, and was injured by his clothing becoming caught therein, the danger was so obvious as to work an assumption of risk as a matter of law." *Muenchow v. Theo. Zschetzsche & Son Co.* (Wis. 1902), 88 N. W. Rep. 909. "Where, in an action by a servant for injuries, the evidence of both parties shows the risk assumed, the direction of a verdict for defendant is proper, notwithstanding the fact that, where there is any dispute in the evidence, the burden of proof as to the assumption of the risk of employment is upon the defendant." Judgment (1901) 73 N. Y. S. 546, affirmed. *Kueckel v. O'Connor*, 76 N. Y. S. 829. "Where, in an action for injuries to a servant, plaintiff's testimony disclosed that he assumed the risk which resulted in his injury, defendant was entitled to the direction of a verdict in its favor on that ground, though the defense of assumed risk had not been pleaded." *Iowa Gold Min. Co. v. Diefenthaler* (Colo. 1904), 76 Pac. Rep. 981.

§ 140. **Falling objects — Cause unexplained.** — Generally, in case of an injury to a miner from falling objects, whether machinery or missiles, or other objects, likely to fall into the mine and injure an employee, it is not sufficient to prove the injury and the falling object. But the falling of the substance causing the injury must be traced to the employer's negligence, for otherwise it has not been established that the negligence of the employer was the approximate cause of the injury, which is essential to establish, in every case, before there is a resulting liability.¹ Hence, the mere falling of machinery, without proof that the falling was due to a defect that would have been discovered by a reasonably careful inspection, will not render the employer liable,² nor will the proof of an injury to a miner, employed in a mine, by a missile of some kind striking him, without proof of the nature or cause of its fall, render the employer liable,³ or the falling of a bucket, attached to the hoister rope, where the fall could result either from the absence of a brake, or the negligence of a fellow-servant, operating the hoister,⁴ for, in all such cases, there is a failure of proof, as to the approximate cause of the injury, and a peremptory instruction for the defendant should be given the jury.

§ 141. **Fall of earth bank assumed.** — In most of the best considered cases the risk of injury from the falling of

¹ White Mines & Mining Remedies, Sec. 450 and cases cited.

² The mere proof of the absence of a particular part of a machine and a resulting injury to an employee, using it in that condition, does not establish that the injury was due wholly to the absence of the part of the machine. *Plafka v. Knapp, Stout & Co.*, 145 Mo. 316.

³ *Jacobson v. Smith* (Iowa, 1904), 98 N. W. Rep. 773.

⁴ *Luman v. Golden Ancient Channel Mining Co.*, 140 Cal. 700; 74 Pac. Rep. 807. In an action to a miner for an injury from a falling missile, the nature or cause of which was unknown, there is no proof of any negligence sufficient to support a recovery. *Jacobson v. Smith* (Iowa), 98 N. W. Rep. 773.

a bank of earth or gravel, being due to natural law, is held to be a risk assumed by the employee, as a matter of law.¹

§ 142. **Dynamite explosions in loading drill holes.** — The United States Court of Appeals, in a well considered case, has recently held that an employee of two or three years experience who is injured by the premature explosion of dynamite, in loading a drill hole in a mine, with an iron tamping bar, familiar with the characteristics of giant powder and the liability of explosions, assumed the risk of injury as a matter of law² and this seems in accord with the weight of authority upon explosions in similar cases.

§ 143. **Injury from unexploded shots.** — In a recent well considered case in Missouri, by the Supreme Court, an employee who was a helper of a drillman, was held, as a matter of law, to assume the risk of injury from drilling into and exploding an unexploded shot.³

§ 144. **Injury from set screw, assumed as matter of law.** — The risk of injury from a protruding set screw is so plainly obvious that an employee is held to assume such risk, as a matter of law, in most jurisdictions, under the familiar rule that obvious risks from dangers that are ap-

¹ *Brown v. Chattanooga Co.*, 101 Tenn. 252; 47 S. W. Rep. 415; *Olsen v. McMullen*, 84 Minn. 95; *Aldrich v. Furnace Co.*, 78 Mo. 559; *Pederson v. Rushford*, 41 Minn. 290; *Swanson v. Great Northern Co.*, 68 Minn. 184; 70 N. W. Rep. 978; *Del Sejnore v. Hallman*, 153 N. Y. 274; 47 N. E. Rep. 808; *Hughes v. Malden & Co.*, 168 Mass. 896.

² *King v. Morgen*, 109 Fed. Rep. 446; 10 Amer. Neg. Rep. 200. See also *Whaley v. Coleman* (Mo. App. 1905) 88 S. W. Rep. 119.

³ *Livengood v. Joplin Mining & Smelting Co.*, 179 Mo. 229; 77 S. W. Rep. 1077. For additional cases, where the court, as matter of law, passed upon the assumption of risk from unexploded shots, see *Stadtler v. Huntington*, 153 Ind. 854; *Allerd v. Hildreth*, 173 Mass. 26.

parent are assumed by all employees, regardless of age or experience.¹

§ 145. **When safety of place a question of law.** — Where the undisputed evidence, in an action for an injury from a failure to provide a reasonably safe place, establishes that the place was reasonably safe or that the injury to the plaintiff is not the result of any negligence upon the defendant's part, with reference to the place of work, it is proper for the court to direct a verdict for the defendant. In a Michigan case, where the plaintiff was injured by having molten iron fly into his eye, and the evidence showed that a teaspoonful of molten iron was spilled upon the floor and striking the floor, which was damp, a portion of it flew into the plaintiff's eye, it was held that there was no issue to submit to the jury, as to the safety of the place where the accident occurred, although the testimony showed that the floor was made too damp and the use of the iron occurred too soon after sprinkling and that it was customary to sprinkle several hours before using the molten iron, and that no explosion would result if the iron struck upon a dry floor.²

§ 146. **Employment or retention of incompetent employees.** — A master is held, in Michigan, to have exercised due care, in the employment of a brakeman to run a mine, where the machinery used was simple and easily managed, where, before hiring, he made inquiries of one competent to judge of the applicant's knowledge and experience, and he further had him instructed and watched by the engineer, for a time after he commenced

¹ Demers v. Marshall, 172 Mass. 548; 52 N. E. Rep. 1066. For list of cases on this ground of assumption of risk, see White Mines & Mining Remedies, Sec. 450, *et sub.*, and cases cited.

² Nowakowski v. Detroit Stove Works, 9 Det. Leg. N. 25; 89 N. W. Rep. 956.

work.¹ Nor would the fact that the employee was but seventeen years of age, raise a presumption of negligence against the employer, where he had, for over seven months, performed the duties of the place, without accident.² And the fact that he might, on some occasions, have been negligent, would not charge the employer with notice of such negligence, where no injury to his employees resulted and there was nothing to give him notice of such negligence.³

§ 147. **Failure to call for props — Knowledge of conditions.** — In some of the mining States, under statutes requiring props to be sent down, a request and refusal or failure on the master's part to deliver the timbers requested is essential to a liability, under the statute, and where this is held, a failure to establish these facts, will justify a verdict for the defendant, as a matter of law.⁴

¹ *Walkowski v. Penokee & G. Consolidated Mines*, 115 Mich. 629; 41 L. R. A. 33; 73 N. W. Rep. 895.

² *Ante, idem. Wabash Co. v. McDaniels*, 107 U. S. 454; 27 L. Ed. 905; *Kansas & Texas Coal Co. v. Brownlie*, 60 Ark. 582; *Neal v. Gillett*, 23 Conn. 487; *Molaskee v. Ohio Coal Co.*, 86 Wis. 22.

³ *Walkowski v. Penokee Con. Mines, supra*; *Cameron v. N. Y. & C. Co.*, 145 N. Y. 400. A certificate of competency, given to an engineer, by the State board of mine examiners, under Illinois statute, is not conclusive as to his competency, between the employer and another employee. *Consolidated Coal Co. v. Seniger*, 179 Ill. 370; 58 N. E. Rep. 733. For case where the court disposed of the contention as to the employment of an incompetent servant, see *Acme Coal Mining Co. v. McIver*, 5 Colo., p. 267.

⁴ *Leslie v. Rich Hill Coal Mining Co.*, 110 Mo. 81; *Cole v. Mayne*, 122 Fed. Rep. 836. See, also *Wajkaska v. K. & T. Coal Co.*, 87 S. W. Rep. 506. "Where plaintiff was employed in the removal of stumps supporting the roof of a certain part of defendant's mine, it was the duty of defendant to keep its roof at entrances and parts of the mine where plaintiff was not working in a reasonably safe condition; but as to the part of the mine where plaintiff was removing stumps, it was his duty to keep the roof propped, and, if his negligent failure to do so after being warned of the danger by defendant resulted in injuries to himself defendant was not liable." *East Jellico Coal Co. v. Golden*, 79 S. W. Rep. 291; 26 Ky. Law Rep. 2056.

In a recent Iowa case, where the decedent, a miner, was killed in taking out a pillar of coal, which had been left for the support of the roof, but there was no evidence that he called for any props or timbers, but it affirmatively appeared that he knew the coal was crumbling, because of the weight of the roof, it was held that the trial court properly directed a verdict for the defendant.¹

¹ Olsen v. Maple Grove Coal & Mining Co., 87 N. W. Rep. 786. See, also, Watson v. K. & T. Coal Co., 52 Mo. App. 866.

CHAPTER VIII.

INSTRUCTIONS IN MINING INJURY ACTIONS.

- SECTION 148.** Burden of establishing defendant's negligence.
149. Charge should define degree of care required.
150. As to an obviously defective appliance.
151. As to open and visible risks.
152. Patent and latent dangers defined.
153. Knowledge of natural laws — Instruction imputing notice of gravitation.
154. Upon duty to warn inexperienced employees.
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161. "Reasonable care" the test of plaintiff's knowledge.
162. Erroneous instruction on promise to repair.
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164. On failure to furnish screen for furnace.
165. Assumption of risk — Servants selection of tools.
166. On right to rely upon defendant's assurance.
167. As to reasonable safe place in which to work.
168. Charge referring to rope as "appliance" proper.
169. Erroneous charge, as to duty to warn employees.
170. Instruction withdrawing custom from jury, error.
171. Erroneous instruction on credibility of witnesses.
172. Erroneous instruction on shifting of belt.
173. Assumed risk — Limiting defense to danger threatening injury.

§ 148. **Burden of establishing defendant's negligence.** — As the sole right of the plaintiff, in an action for personal injuries, to recover, is the breach of a legal duty owing to him by the defendant, it is generally essential for him to show such breach of duty as a basis for his recovery, and hence, it is always proper to instruct the jury that the burden of establishing some negligence upon the defend-

ant's part, causing the injury to the plaintiff, is upon the plaintiff, and if the court, in its charge to the jury, authorizes a recovery without reference to the defendant's negligence, such a charge would constitute reversible error.¹

§ 149. Charge should define degree of care required. — A charge to a jury should explain to them that the test for determining the comprehension of risk by the plaintiff is his exercise or failure to exercise "ordinary care" in the premises. If the instruction fails to give to the jury this guide, as where it simply tells them that although a given appliance was defective, yet, if from his experience, or observation, the plaintiff knew, or should have known, of its condition, he is held, in law, to have assumed the risk of its insufficiency, it is erroneous, in that it fails to define, with any precision at all, the degree of care or observation which the law requires.² And it would also be error, in omitting this guide to the jury, where they are simply told that the plaintiff did not assume the risk, incident to the method under which the

¹ Where, in an action for personal injuries, the answer denied negligence, instructions ignoring any question of negligence, and authorizing a verdict for plaintiff, even though no negligence was shown, were erroneous. *Burton v. Quincy, O. & K. C. Co.* (Court of Appeals, Missouri, April 3, 1905), 86 S. W. Rep. 503. Where the court charged that plaintiff could not complain or recover because of defendant's negligence in failing to properly secure any other part of the mine than that in which plaintiff was injured as alleged, and that defendant was not an insurer of plaintiff's safety, but was merely bound to exercise ordinary care for plaintiff's safety under the circumstances, it was not error for the court to refuse to specifically charge that the happening of the accident, of itself, was not evidence of negligence. *Highland Boy Gold Min. Co. v. Pouch*, U. S. C. C. A. (Utah, 1903), 124 Fed. Rep. 148.

² *Durand v. N. Y. & L. B. Co.*, 65 N. J. L. 656; 48 Atl. Rep. 1013. "In an action for injuries alleged to have been occasioned by defendant furnishing an appliance which was insufficient, an instruction declaring that, if plaintiff knew the facts therein hypothesized, he could not recover, without the qualification, 'or if he by the exercise of ordinary care could have discovered the dangers attending the use of the' appliance,

defendant conducted its business, unless he "must necessarily" have known of the dangers of such method by the exercise of ordinary care. If, by "ordinary care," the plaintiff could have known of such methods, his knowledge thereof is presumed and the requisite that he "must necessarily" have known, exempts him from the duty to know, if by ordinary care he could have known, and only holds him responsible for a knowledge he "must necessarily" have had, even if negligent, hence, such a charge is error.¹

§ 150. **As to an obviously defective appliance.**— Upon the employee's assumption of risk from the use of an obviously defective appliance it is held, in Missouri, to

is erroneous, as it impliedly authorized a recovery if plaintiff did not know such facts, though by the exercise of ordinary care he could have known them." *Breeden v. Big Circle Min. Co.*, 76 S. W. Rep. 731. "Where, in an action for injuries to a miner, the court charged that, if the defects in the shaft which caused the injury had existed a sufficient time so that defendant, by ordinary care, would have discovered them prior to the accident, then defendant was negligent, another instruction that, if defendant was negligent in not having the shaft in order, and that just prior to the accident some repairs were made, and when the cage was moved because of the defects plaintiff was injured, he was entitled to recover, was not objectionable as authorizing the jury to find defendant guilty of negligence, though the shaft might not have been out of repair a sufficient length of time to enable defendant, by the exercise of ordinary care, to discover and remedy the defects." *Morgan v. Mammoth Min. Co.* (Utah, 1903), 72 Pac. Rep. 688.

¹ *Galveston H. & S. Co. v. English* (Tex. Civ. App.), 59 S. W. Rep. 626. "An instruction that if, in passing a prop in a coal mine, the plaintiff 'could have discovered how close it was, and could have learned whether the same was reasonably safe,' etc., is an erroneous statement of the degree of care required of servants in examining places where they work, as it omits the qualifying words 'if he could,' etc., 'by exercising reasonable or ordinary care.'" *Gruenendahl v. Consolidated Coal Co.*, 108 Ill. App. 644. "In an action for injuries to a coal miner, an instruction that if defendant violated the statute in maintaining the passageway in which plaintiff was injured, and which passageway communicated with the escapement shaft, at less than the required size, and such accident was the result of willful negligence, then plaintiff might recover,

be the law that: "If the defect is patent, open to observation, or such as the ordinary use of the machine, in the business the servant is engaged in, would disclose to an ordinarily observant man, operating it, and the servant had ample opportunity, by operating it, before being injured, to observe the defect, his opportunity to know would be held as knowledge, whether in fact he knew of the defect or not,"¹ and this opportunity to know and the obvious nature of the defect, in case of a resulting injury, would preclude a recovery by the injured servant. In Michigan a similar instruction was held proper, which told the jury that, "It was plaintiff's duty to inform himself as to the danger in using the appliance in question, so far as he could, by observation, and if it was defective, he cannot recover, unless it appears, by a preponderance of the evidence, that the defect was not observable by ordinary, careful observation."²

without a finding that he was in the exercise of ordinary care, is not unsupported by the evidence, on the ground that the passageway in which plaintiff was injured was not a passageway communicating with the escapement shaft, where a witness has testified that, to get to his place, he would start at the bottom of the shaft, and go straight along the main entry about 400 or 500 yards, then east the same distance, then to the left 300 feet, which was the road to get out to the escapement shaft, and was the road in which plaintiff was injured." *Spring Val. Coal Co. v. Rowatt*, 68 N. E. Rep. 649; 196 Ill. 156.

¹ *Parker v. Hannibal & St. J. Co.*, 71 Mo. 66; 36 Amer. Rep. 454. "An instruction that if the latch of a coal bucket was not properly fastened, and if, on account of such unsafe fastening, plaintiff was injured, the jury should find for plaintiff unless they found that plaintiff knew the catch was not in a safe condition, or, if unsafe, its condition was obvious to him, etc., was erroneous, as in effect charging that the fact specified would establish actionable negligence, instead of submitting such question to the jury." *Missouri, K. & T. Co. of Texas v. Smith*, 82 S. W. Rep. 787.

² *Chilson v. Lansing & Co. Works*, 128 Mich. 43; 87 N. W. Rep. 79. For a very similar instruction, approved in Minnesota, see, *Anderson v. Minn. & N. W. Co.*, 89 Minn. 523; 41 N. W. Rep. 104. "In an action for the death of a miner, an instruction requiring of defendant the absolute duty to make the mouth of the shaft where such miner was working rea-

§ 151. **As to open and visible risks.**—In Pennsylvania, a servant is held chargeable and “will be deemed to have notice of all risks which, to a person of his experience and understanding, are, or ought to be, open and visible.”¹ As most generally stated, the servant is held to assume all risks readily discoverable by the exercise of “ordinary” or “reasonable” care and prudence, or similar qualifications, expressing practically the same thing.² In Wisconsin, it is said, “an employee is not acquitted of assumption of risk, merely because he did not comprehend the danger; but the test is whether an ordinarily prudent person, of his age and experience, under like circumstances, would have comprehended the risk.”³ And a similar statement of the rule is adhered to in Tennessee,⁴ Minnesota,⁵ Texas,⁶ and Oregon.⁷

sonably safe, is not properly modified by a further paragraph that if the track as constructed was dangerous, and certain boys were using the cars with defendant's knowledge, and that defendant failed to guard the shaft, so as to make it reasonably safe against accidents, etc., to find for plaintiff.” *Knight v. Sadtler Lead & Zinc Co.*, 91 Mo. App. 574.

¹ *Rummell v. Dillworth*, 111 Pa. 343; 2 Atl. Rep. 355.

² *Williams v. Del. &c. Co.*, 116 N. Y. 628; *Denver Tramway &c. Co. v. Nesbit*, 22 Colo. 404; 45 Pac. Rep. 405; *O'Neal v. C. & I. Coal Co.*, 132 Ind. 110; 31 N. E. Rep. 669; *Bryce v. C. M. & St. P. Co.*, 103 Iowa, 665; 72 N. W. Rep. 780; *Corlson v. Sioux Falls Co.*, 5 S. D. 402; 59 N. W. Rep. 217; *Chesson v. John L. Roper Co.*, 118 N. C. 59; 28 S. E. Rep. 925. “In an action by an experienced coal miner, who was employed to timber the mine and look out for and remedy dangers from caving, for injuries sustained by falling coal and dirt, where it was shown that he had discovered the dangerous situation and continued to work there after he had requested and been promised assistance, an instruction that, if the dangers and defects were so obvious and threatening that a reasonably prudent man would have avoided them, plaintiff was guilty of contributory negligence and assumed the risk of injury, was proper.” *Rocchia v. Black Diamond Coal Min. Co.* (U. S. C. C. A. Wash. 1908), 121 Fed. Rep. 451.

³ *Cravens v. Smith*, 89 Wis. 119; 61 N. W. Rep. 317.

⁴ *Ferguson v. Phoenix Mills*, 106 Tenn. 236; 61 S. W. Rep. 53.

⁵ *Anderson v. Min. & Mill Co.*, 39 Minn. 523; 41 N. W. Rep. 104.

⁶ *Gulf, C. & S. F. Co. v. Johnson*, 83 Texas, 630; 19 S. W. Rep. 151.

⁷ *Johnston v. Oregon S. N. & U. N. Co.*, 23 Or. 94; 31 Pac. Rep. 283.

§ 152. **Patent and latent dangers defined.** — To give the triers of the fact an adequate idea of the proper distinction between patent and latent dangers, it is always best for the court to define each, by an appropriate instruction. In a recent Delaware case a fairly accurate definition is given, as follows: “Patent dangers are those seen, or by their presence, perceptible to the senses. Latent dangers are those not seen, or perceptible to the senses, by their presence.”¹

§ 153. **Knowledge of natural laws — Instruction imputing notice of gravitation.** — Even the most ignorant workmen, if not of impaired intelligence, are conclusively presumed to know the effect and operation of natural laws and certainly when the law presumes a knowledge of its own shifting doctrines, a familiarity with the immutable laws of nature ought to be conclusively presumed on the part of every creature subject to those laws.² In a Texas case, where an injury to an employee occurred, as a result of the sliding of a bank of earth near which he was at work, although he was of little or no experience, it was held that the defendant was entitled to an instruction that “if the risk was as open to the observation of the servant as to the foreman, it was assumed.”³ But in Louis-

¹ *Williams v. Walton & Co.*, 9 *Houst. (Del.)* 322; 32 *Atl. Rep.* 726. See, also, *Bennett v. Tintic Iron Co.*, 9 *Utah*, 291; 34 *Pac. Rep.* 61; *Carey v. H. & St. J. Co.*, 86 *Mo.* 635; *Kohn v. McNulta*, 147 *U. S.* 238; 37 *L. Ed.* 150; 13 *Sup. Ct. Rep.* 298; *Meany v. Oil Co. (N. J. L.)* 47 *Atl. Rep.* 803; *Rietman v. Stolte*, 120 *Ind.* 314; 22 *N. E. Rep.* 304; *Sykes v. Packer* 99 *Pa.* 465; *Faren v. Sellers*, 39 *La.* 1011; 8 *So. Rep.* 863; *Quick v. Minn. Iron Co.*, 47 *Minn.* 361; 50 *N. W. Rep.* 244; *La-Motte v. Boyce*, 105 *Mich.* 545; 63 *N. W. Rep.* 517.

² *White Mines & Mining Remedies*, Secs. 450, 451, and cases cited.

³ *Texas & Pac. Co. v. French*, 86 *Texas*, 96; 23 *S. W. Rep.* 642. See also *Aldrich v. Furnace Co.*, 78 *Mo.* 559; *Watson v. Coal Co.*, 52 *Mo. App.* 366; *Lorich v. Mails*, 18 *R. I.* 513; 28 *Atl. Rep.* 661; *Brown v. Chattanooga Co.*, 101 *Tenn.* 252; 47 *S. W. Rep.* 415; *Olsen v. McMullen*, 34 *Minn.* 94; 24 *N. W. Rep.* 318; *Reiter v. Winona Co.*, 72 *Minn.* 225; 75 *N. W. Rep.* 219.

iana,¹ and Illinois² an inexperienced employee is not held to be chargeable with a knowledge that a position near a perpendicular bank is dangerous, because liable to fall at any minute, under the force of natural laws. This view, however, is counter both to the reason of the law itself and the weight of authority upon this question, for if the employee under the implied contract of his employment is not held to assume the risks of injuries from coming in contact with natural laws, then the doctrine of assumed risks has no existence in fact.

§ 154. **Upon duty to warn inexperienced employees.** — Of a peril resulting from unseen and unappreciated conditions and forces, to an inexperienced man, who would know nothing thereof by the exercise of his senses, but who would only come to a knowledge thereof by being instructed in regard to it, there is a duty on the part of the employer to warn the employees, ignorant of the dan-

¹ *Daly v. Kiel*, 106 La. 170; 80 So. Rep. 254.

² *Alton Paving & Brick Co. v. Hudson*, 74 Ill. App. 612; 176 Ill. 270; 52 N. E. Rep. 256. "In an action by a servant for personal injuries sustained while working under the orders of defendant's foreman at the bottom of a quarry, through earth falling upon him from the bank above, it was proper to refuse an instruction that if plaintiff went to work after examining the bank, or after opportunity to do so, then defendant did not owe to plaintiff the duty of warning him of danger; defendant being required to exercise reasonable diligence in seeing that the place where plaintiff worked was safe." *Western Stone Co. v. Muscial*, 63 N. E. Rep. 664; 196 Ill. 382. "Where the court charged that it was plaintiff's duty to take ordinary care to learn the dangers of his employment, and that he was required to inform himself, and was bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly, and if he failed to do this he assumed the risk, and could not recover if he was injured as the result of his failure to see what was apparent to any person using his eyes, a further instruction that it was defendant's duty to explain to plaintiff the dangers of the business was not objectionable on the ground that it impliedly required defendant to point out obvious dangers." *Shickle-Harrison & Howard Iron Co. v. Beck*, 72 N. E. Rep. 423; 212 Ill. 268.

ger to which they are exposed, of the risks to which they are subjected. This duty has been held to exist as to the danger from explosion by the contact of hot slag with water or ice;¹ the tendency of molten iron to explode, when punctured,² the dangerous contact of poisonous fumes,³ and similar, unseen dangers to the uninitiated.⁴ As to all such dangerous forces and agencies, it is the duty of the employer to warn such of his employees as are not familiar therewith, of the dangers reasonably to be apprehended therefrom, in the performance of their duties and the jury should be so charged, in an action for an injury from such a cause.⁵

§ 155. **Instruction on dangerous properties of dynamite.** — As to an inexperienced employee, where the master has information of his lack of experience or familiarity with the danger of handling dynamite, it is held proper to instruct the jury that “it is the employer’s duty, before

¹ *McGowan v. La Plata Min. and Smelting Co.*, 8 McCrary, 398; 9 Fed. Rep. 861; *Ribich v. Lake Superior Smelting Co.*, 123 Mich. 406; 82 N. W. Rep. 279; 48 L. R. A. 649; *Redmond v. Butler*, 168 Mass. 867; 47 N. E. Rep. 108; *Hunt v. Lead Co.*, 104 Mo. App. 377; 79 S. W. Rep. 710.

² *Holland v. Tenn. Coal and Iron Co.*, 91 Ala. 444; 8 So. Rep. 524; 12 L. R. A. 232.

³ *Wagner v. Jayne Co.*, 147 Pa. 475; 23 Atl. Rep. 772.

⁴ *Parkhurst v. Johnson*, 50 Mich. 70; 15 N. W. Rep. 107; 45 Amer. Rep. 28.

⁵ *McGowan v. La Plata Mining and Smelting Co.*, and authorities *supra*. “An instruction that, if plaintiff was employed to work in a certain department, and to obey the orders of the foreman, then plaintiff was not required to have any better knowledge of the condition of the machinery than he would derive from a careful exercise of his sight and hearing, and if, under these circumstances, and while in the line of his duty and obeying orders of the foreman, plaintiff was injured, to find for plaintiff, was not erroneous as leading the jury into concluding that there might be a recovery even though plaintiff had actual knowledge of the danger.” *Gould Steel Co. v. Richards* (Ind. App. 1908), 66 N. E. Rep. 68.

using a highly dangerous explosive, to ascertain and make known, to his employees, not familiar with its properties, the danger to be reasonably apprehended from its use;"¹ a like duty is recognized, by the United States Supreme Court, upon the part of an employer, to notify a workman who is not a miner and knows nothing about dynamite or other dangerous explosives, of the danger of causing an explosion from overheating or jarring dynamite.² But as to an employee of ordinary experience in the use of dynamite there is no duty on the part of the employer to warn such employee as to the explosive character of the material, and an instruction that a duty of warning such an employee existed, would be error on the part of the trial court.³

§ 156. Instruction should define fellow-servant. — Where the evidence is undisputed upon the question of

¹ *Bertha Zinc Co. v. Martin*, 93 Va. 791; 22 S. E. Rep. 869.

² *Matthews v. Rillston*, 156 U. S. 391; 39 L. Ed. 464; 15 Sup. Ct. Rep. 464; *Grimaldi v. Lane*, 177 Mass. 565; 59 N. E. Rep. 451; *Burke v. Anderson*, 69 Fed. Rep. 814; 84 U. S. App. 182; 16 Cir. Ct. App. 442; *Lofrano v. N. Y. &c. Co.*, 55 Hun, 452; 8 N. Y. Supp. 717.

³ *Livengood v. Joplin Mining and Smelting Co.*, 179 Mo. 229; 77 S. W. Rep. 1077. See Chapter, *Injuries from Powder Explosions*. "In an action by a miner for injuries from the premature explosion of a blast, the court instructed that, if defendant's foreman neglected to notify plaintiff, his negligence would be that of the defendant, and that if a higher grade of explosive was furnished plaintiff without notification, and he did not know of its character, he did not assume the risk. On defendant's behalf the court instructed that unless the jury believed defendant changed the grade of powder without plaintiff's knowledge, and that he remained ignorant thereof, and that the substituted powder required a higher degree of care in handling, and that the change substantially increased plaintiff's danger and was the proximate cause of his injuries, and that he was free of contributory negligence, they should find for defendant. *Held*, that the instruction that plaintiff did not assume the risk, when considered with the instruction given at defendant's request, was not erroneous, as permitting plaintiff to recover if he was guilty of contributory negligence." *Chambers v. Chester* (Mo. 1908), 172 Mo. 461; 72 S. W. Rep. 904.

the capacity of the servant causing the injury, the court can, as a matter of law, declare that such servant is not a co-employee with the injured servant. But where the evidence is disputed and the issue as to the capacity of the servant causing the injury is to be submitted to the jury, it is proper for the court to tell them, by an appropriate instruction, just what is meant, in law, by the term "fellow-servant."¹

¹ Consolidated Coal Co. v. Shepherd, 112 Ill. App. 458. "An instruction which tells the jury that if they believe from the evidence that the plaintiff was injured by the negligence of a fellow-servant, or by the negligence of himself combined with that of a fellow-servant, they will find for the defendant, is properly refused where the party asking the same has requested no instruction telling the jury what constitutes a fellow-servant." Consolidated Coal Co. of St. Louis v. Shepherd, 112 Ill. App. 458. "In an action by an employee for damages, in which the issues are submitted on the evidence of the plaintiff alone, an instruction placing the burden of proof on defendant to establish that the injury occurred through the fault of a fellow-servant of plaintiff is not erroneous." Consolidated Kansas City Smelting and Refining Co. v. Osborne (Kan. 1903), 71 Pac. Rep. 888. "In an action by a miner for injuries owing to the cage in which he was being lowered into the mine coming into contact with certain 'chairs' projecting into the shaft, which chairs were used to steady the cage when it stopped at a level, and which, when in proper order, automatically fell back out of the way when the cage was lifted from off them, the evidence showed that it was the duty of the 'cage rider' who managed the cage to make a trip before taking miners into the mine, in order to see that the chairs were in order, but that on the occasion in question he failed to perform such duty, and that the chairs had been out of order for some months, so that they would not automatically drop back. It appeared that a servant known as a 'tool carrier,' had just before the accident been down the shaft with the cage, but he testified that he did not remember whether he had fastened the chairs under the cage, and the evidence did not show that the tool carrier or the cage rider were fellow-servants. Held, that it was proper to refuse to instruct that there could be no recovery, though the appliances were defective, if the proximate cause of the injury were the negligence of a fellow-servant, and if the accident would not have happened if the cage rider had made the trip to see that the chairs were in proper condition." Jenkins v. Mammoth Min. Co. (Utah, 1902), 68 Pac. Rep. 845.

§ 157. **In actions for failure to furnish props.**—In actions for failure to furnish props, the instructions should follow the petition, with reference to the character of negligence authorizing a recovery. If the action is for a violation of the common law duty to prop, it is not essential to predicate the right to recover upon an element of willfulness on the defendant's part;¹ but frequently, under statutory actions, an intentional violation of the statute must be shown and where this is done, a recovery should only be authorized upon a willful violation of the statute by the defendant.²

¹ *Carson v. Coal Hill Co.*, 101 Iowa, 224; *Olsen v. Coal Co.*, 115 Iowa, 74; 87 N. W. Rep. 736.

² *Consolidated Coal Co. v. Young*, 24 Ill. App. 255; *Durant v. Coal Co.*, 97 Mo. 67; *Leslie v. Coal Co.*, 110 Mo. 31. "An instruction ignoring a statutory provision relieving the operator from securing the roof at a place where coal is being mined, and only requiring him to provide props, caps, and timber for the miner to use, was not erroneous, where the place of the accident was not one where the miners were working, but was over a track where the miners were not called on to put up props. 97 Ill. App. 109, affirmed. *Consolidated Coal Co. v. Lundak*, 68 N. E. Rep. 1079; 196 Ill. 594. "Where evidence tended to show that the shift boss of a mine, on being notified that certain of the timbers in the stope in which plaintiff was injured were taking weight, not only promised to erect additional supports, but assured plaintiff that it was perfectly safe for him to remain there and continue his work, such evidence justified an instruction that if plaintiff called the attention of the shift boss to the fact that some of the posts were taking weight, and that the boss promised to remedy the defect, and plaintiff continued to work because of such promise, he did not assume the risk from such defect." *Highland Boy Gold Min. Co. v. Pouch* (U. S. C. C. A., Utah, 1903), 124 Fed. Rep. 148. "Plaintiff was injured by the falling of a stone from the roof of a room in a coal mine, in which room he and another alone worked. It was part of their duty, as they extended the room by their digging, to see that the roof was properly supported by timbers, which it was the duty of defendant employer to furnish. *Held* that, the evidence being conflicting as to whether the accident happened from failure of defendant to furnish timbers or from plaintiff's failure to use those furnished, it was misleading to instruct, without qualification, that defendant assumed the duty of furnishing a reasonably safe place for plaintiff to work." *Kansas & T. Coal Co. v. Chandler* (Ark. 1908), 77

§ 158. **On failure to repair as continuing negligence.** — In an action for the death of a servant from the explosion of an engine, due to a failure to repair the same, it was held proper to charge the jury that “if the caps had been left off the screws on the throttle cap this was continuing negligence, on defendant’s part, although the intestate might have ascertained it, and if that fact was the approximate cause of the injury, the plaintiff was entitled to recover.”¹ But following such a charge, it would be error to give a repetition of the instruction, to the effect that if the defect might, by reasonable care, have been known to the defendant, a continuance of the failure to repair, was a continuance of the negligence and the plaintiff was not guilty of contributory negligence, as this omitted the essential fact that the defect caused by the failure to repair must have been the approximate cause of the injury to the plaintiff.²

S. W. Rep. 912. “In an action for the death of plaintiff’s father, resulting from the failure of a mine owner to deliver props and cap pieces, as required by Hurd’s Rev. St. 1899, c. 93, §§ 14, 16, with the miner’s empty car, no objection was made to the sufficiency of the declaration, which averred that ‘It was the defendant’s duty to deliver props and caps as required, and when requested to do so by the miners.’ The evidence fairly tended to support the allegation that the deceased miner sent up a request for props, which were not furnished him. *Held* not error to refuse an instruction to find defendant not guilty, on the ground that there was no evidence tending to show that the company failed to furnish props as required by the statute.” *O’Fallon Coal Co. v. Laquet*, 64 N. E. Rep. 767; 198 Ill. 125. “Where there was evidence that the falling of a portion of the roof of a mine, which caused deceased’s death, was the result of defendant mining company’s failure to prop the same, an instruction that it was defendant’s duty to provide a reasonably safe place for deceased to work in, and that if it failed to do so, and for this reason deceased, while performing his duty and in the exercise of due care, was injured by the falling of the roof, because of the absence of sufficient props, plaintiff was entitled to recover, was not objectionable.” *Himrod Coal Co. v. Clark* (Ill. 1902), 64 N. E. Rep. 282; 197 Ill. 514.

¹ *Marcus v. Loane & Co.*, 133 N. C. 54; 45 S. E. Rep. 354.

² *Ante, idem.*

§ 159. **As to risks beyond the scope of employment.** — In an action for an injury in obeying an order to render services, outside the scope of the employment, or for other and more dangerous work than was intended at the time of the employment of the plaintiff, it is proper to charge the jury that it is “the master’s duty not to expose the servant to risks beyond those incident to his employment, and such as were in contemplation at the time of the making of the contract of service.”¹ But such an instruction would not be proper in a case where there was no evidence of an exposure of the servant to risks beyond the scope of the employment, for this authorizes a recovery upon a ground of negligence not shown by the evidence to exist.²

§ 160. **As to duty of inexperienced servant, after instruction.** — In an action by an employee for injuries received from a failure to warn him of impending danger, a charge that the defendant should have caused the plaintiff to be instructed as to the dangers in operating the machine, upon which he was engaged in work, at the time of his injuries, and that “a servant, after proper instruction, was bound to exercise that diligence which would be expected of a person of his age and capacity and after such instructions were given and understood the plaintiff was subject to all the duties and liabilities of any other employee and should show the diligence to be expected of a young man of his age and experience,” is proper.³ But after instructing that a child could not recover if he failed to exercise such care as would be reasonably expected from one of his mental and physical capacity, it is error to further tell the jury that he could not recover if he did not know that the machinery was dangerous and the accident happened by

¹ *Parlett v. Dunn* (Va. 1904), 46 S. E. Rep. 467.

² *Ante, idem.*

³ *Vinson v. Morning News Co.*, 118 Ga. 655; 45 S. E. Rep. 481.

reason of a defect therein, as this held the plaintiff to too great a degree of diligence, *i. e.*, to discover latent defects in the machinery, which is not a duty imposed upon adult employees, much less upon infants.¹

§ 161. “**Reasonable care**” the test of plaintiff’s knowledge. — An instruction which imputes knowledge of a defect or danger to the plaintiff regardless of whether it could have been ascertained by the exercise of “reasonable care” on his part, is erroneous. In an action for an injury from passing a prop, in a coal mine, an instruction that “if the plaintiff could have discovered how close it was, and could have learned whether the same was reasonably safe,” he could not recover, is erroneous, as it omitted the qualifying phrase, “by the exercise of reasonable or ordinary care on his part.”² And so, in Missouri, it is held that it is error to instruct the jury that an employee injured by reason of a defective appliance cannot recover if he could have discovered such defects, where the qualification is omitted, or if he could, “by the exercise of ordinary care, have discovered the defects in the appliance,” as it holds the employee to a greater degree of diligence than the law contemplates he shall exercise.³

¹ *Eagle & Phoenix Mills v. Herron*, 119 Ga. 389; 46 S. E. Rep. 405. “An instruction, in an action for injury to an employee in a coal mine through the falling of a stone from the roof of the room in which he and another worked, that, if the plaintiff was without experience in mining coal, it was defendant employer’s duty to warn him of the dangers, is abstract and misleading, plaintiff’s testimony showing that, though he had dug coal but six weeks, he had, previous to the accident, learned the necessity of keeping the roof properly supported, and knew that an unsupported roof was dangerous, and that it was the master’s duty to furnish supporting timbers, and his duty to put them in place.” *Kansas & T. Coal Co. v. Chandler*, 77 S. W. Rep. 912.

² *Gruendahl v. Consolidated Coal Co.*, 108 Ill. App. 644.

³ *Breeden v. Big Circle Mining Co.*, 103 Mo. App. 176; 67 S. W. Rep. 731. “An instruction that it was plaintiff’s duty to exercise reasonable and ordinary care to avoid danger, and if, by the exercise of such care,

§ 162. **Erroneous instruction on promise to repair.** — In a recent Arkansas case an instruction, in an action for an injury to an employee in a coal mine, through the falling of a stone from the roof of the room in which he worked, that, “if he requested the foreman to furnish him props and the foreman promised to furnish them, then, the plaintiff relied on the promise and for that reason continued at his work, he did not assume the risk incident upon the failure to furnish the props,” is held to be misleading, as the plaintiff would not have been justified in exposing himself to a danger so obvious and imminent if no person of ordinary prudence would have exposed himself to it, under like circumstances.¹ In other words, the question of the plaintiff’s assumption of risk, as well as his contributory negligence, depends upon the full consideration of all the facts in the case and the mere promise to repair would not prevent the assertion of the defense, if other facts in the case showed a state of record sufficient for it to obtain. The instruction singled out facts and gave undue prominence thereto and practically made the defense in the case to turn upon such promise to repair alone.

§ 163. **Injury on scaffold — Wrong submission as to contributory negligence.** — An action, in Arkansas, was based upon the defendant’s negligence in providing an in-

he could have seen the danger in time to have escaped it, then he would be guilty of contributory negligence — given in the case of one employed in a stone quarry in breaking up blasted stone, who was injured by a rock rolled down from the hillside, and in view of the contention and evidence of defendant that plaintiff had been warned not to work with his back to the hill, and that, as the rock rolled down, some one shouted, and others working near plaintiff got out of the way — is correct, and not objectionable because not explaining contributory negligence or defining ordinary care, greater particularity not having been requested.” *Turentine v. Wellington* (N. C. 1904), 48 S. E. Rep. 739.

¹ *Kansas & Texas Coal Co. v. Chandler*, 71 Ark. 518; 77 S. W. Rep. 912.

sufficient and defective and dangerous scaffold for the plaintiff, on which, while at work, in the exercise of due care on his part, he was injured, by reason of the defendant's negligence. On the trial, the defendant claimed and the evidence tended to show that the plaintiff was guilty of contributory negligence in overloading the scaffold. The court charged the jury that if "the plaintiff did overload the scaffold and this was the approximate cause of its giving way, plaintiff could not recover, provided the scaffold was properly constructed and maintained." This was held error, because it stated, in effect, that the plaintiff could not be guilty of contributory negligence, unless the defendant was free from negligence, which is not the law.¹

§ 164. **On failure to furnish screen for furnace.**—Where the evidence, in an action, in Missouri, for an injury from a failure to furnish a screen for a blast furnace, showed that molten iron and other material dangerous to employees was liable to be thrown out of the front of the furnace, without warning, upon employees, in the absence of a screen, which was usually maintained in front of the furnace, but that it had been left off, after repairs to the furnace, an instruction to the jury that if the screen was necessary to protect employees from injury from escaping molten iron, and the defendants had knowledge of such fact, then it was their duty to maintain it in place, in front of such furnace, to prevent the escape of molten iron, is held proper.²

¹ *Wadsworth v. Bugg*, 71 Ark. 501; 76 S. W. Rep. 549. "In an action by a servant for injuries, defendant's testimony, tending to show that plaintiff and his co-employees, while turning the crank of a derrick, carelessly released their hold too soon, thereby letting the load fall too rapidly, and causing plaintiff's injury, justified an instruction on contributory negligence." *Kaminski v. Tudor Iron Works* (Mo. 1902), 67 S. W. Rep. 921.

² *Curtis v. McNair*, 173 Mo. 270; 73 S. W. Rep. 167.

§ 165. **Assumption of risk — Servant's selection of tools.** — If the evidence in an action for injury from unsafe appliances, shows that the plaintiff was accustomed to select his own tools, it is not improper, after charging the jury as to the general duty of the employer toward his employee, in this regard, to instruct them, for the defense, that if the employee was aware of the risk and danger and had himself selected the instrumentalities for doing his work, that it was the duty of the employer to furnish him such tools as he called for that were reasonably safe, and if he failed to call for tools that were reasonably safe, the fault was his, and he could not recover, if his injuries were due to this cause.¹ But such an instruction would be improper, in the absence of a custom that the employee was given to demanding the kind of tools he preferred to use, for, as a general rule, he has a right to rely upon the selection of reasonably safe tools and appliances by the master and for an injury from a neglect of such duty, would be entitled to an instruction that he could recover damages.²

§ 166. **On right to rely upon defendant's assurance.** — Where, in an injury from fallen rock from the roof of a drift, the evidence tended to show that when the plaintiff called the defendant's shift boss' attention to the fact that the timbers were taking weight, he promised to erect additional supports, but assured plaintiff that it was perfectly safe for him to remain at work where he was, without such supports being inserted, it was held that an instruction was proper that if the plaintiff called the attention of the shift boss to the fact that some of the props were taking weight and that the boss promised

¹ *Crawford v. American Steel Co.*, 123 Fed. Rep. 275.

² *Brazil Block Coal Co. v. Gibson* (Ind. 1903), 66 N. E. Rep. 882, *Doyle v. Pittsburg Co.*, 204 Pa. 618; 54 Atl. Rep. 363.

to remedy the defect and that the plaintiff continued his work because of such promise, that he did not assume the risk of injury from such defect.¹ But in an action for injuries from the breaking of a rope, an instruction that if the jury believe, from the evidence, that the plaintiff protested against the use of the rope and was assured by the defendant's agent that it was made safe and that he continued the use of such rope, because of such assurance, and any reasonable man would have so continued to use it after such assurance, is improper, as eliminating both the plaintiff's knowledge of the defects and the danger in the use of the rope.²

§ 167. As to reasonably safe place in which to work.— In an action for an injury resulting from an unsafe place, an instruction is proper which tells the jury that if they believe from the evidence that the plaintiff was ordered into a certain place, by the representative of the defendant, to perform labor for the defendant, it was the duty to provide the plaintiff with a reasonably safe place in which to perform such labor and that the plaintiff has a right to rely upon the performance of this duty, by the defendant, and that for a breach thereof, the defendant is liable in damages to the plaintiff.³

¹ Highland Boy Gold Mining Co. v. Pouch, 124 Fed. Rep. 148.

² Ft. Worth Iron Works v. Stokes (Texas), 78 S. W. Rep. 231.

³ Cobb Company v. Knudson, 107 Ill. App. 668; 207 Ill. 452; 69 N. E. Rep. 816. "Where plaintiff, a miner, descended a ladder used in going to and from his work, and on stepping off the last rung fell into a hole made and left over by the foreman without plaintiff's knowledge, an instruction that where a mining company, in the prosecution of its work, is putting in timbers and floors to catch ore as it is broken down and distribute it into various chutes, and the floors are being changed from time to time to keep up with the work, such floors and timbers and passageways are to be deemed the work itself, and not the place of work, or the means of egress or ingress, within the rule requiring the master to keep them reasonably safe, was not correct, and was properly refused."

§ 168. Charge referring to rope as "appliance" proper. — In an action for an injury from a defective rope, it is not error for the court to use the word "appliance,"

Downey v. Gemini Min. Co. (Utah, 1902), 68 Pac. Rep. 414. "An instruction that it was the master's duty to exercise reasonable care and diligence to provide and maintain a 'safe place' and safe appliances for deceased to use in performing his duties was not misleading, though the breach of duty alleged related only to appliances." *Terre Haute Electric Co. v. Kiely* (Ind. App. 1904), 72 N. E. Rep. 658. "In an action against a mining company for injuries to an employee, an instruction that it was defendant's duty to keep its premises in a reasonably safe condition,—in such condition as they would have been kept by a person of ordinary prudence under the same circumstances, considering the nature of the work to be performed,—was not erroneous for not using the words 'skilled in the business' after the words 'persons of ordinary prudence,' the court having instructed in that connection that 'the defendant was under no obligation to keep the plaintiff absolutely safe and free from danger,' but that its duty was 'to use ordinary care, which is the care ordinarily exercised by persons of average prudence under the same or similar circumstances.'" *Downey v. Gemini Min. Co.* (Utah, 1902), 68 Pac. Rep. 414. "In an action against a coal mining company for injuries received in a mine, an instruction that it was the duty of the defendant to have used ordinary care in furnishing to plaintiff a reasonably safe place in which to work, and to have used reasonable precaution to keep such place in a reasonably safe condition, and if defendant neglected to perform such duty, and plaintiff, while in the exercise of due care and caution for his own safety, was injured as a result of such negligence, then the jury should find the defendant guilty, is properly given." *Consolidated Coal Co. v. Lundak*, 97 Ill. App. 109. "Where a miner was injured by falling through a platform at the foot of a ladder over which he passed in going to and from his work, and the proceedings showed that the only inquiry concerning the defective condition of the mine was with reference to the platform and ladder, an instruction that it was defendant's duty to keep its 'premises' in reasonably safe condition was not erroneous because it did not limit the jury to a consideration of the condition of the place of ingress and egress." *Downey v. Gemini Min. Co.*, 68 Pac. Rep. 414. "In an action against an employer for negligence causing an employee's death, error in instructing that it was the duty of defendant to furnish plaintiffs' son a reasonably safe place in which to work is cured by adding that if the jury believed that the place where the son was working was not reasonably safe, 'but was dangerous,' etc., plaintiffs should recover." *Stumbo v. Duluth Zinc Co.* (Mo. App. 1903), 75 S. W. Rep. 185.

in speaking of the rope to the jury. An instruction that it is the duty of the defendant to exercise reasonable care to furnish to the plaintiff reasonably safe "appliances," and to exercise like care in keeping such "appliances" in a reasonably safe condition, is not misleading, in that it permits a consideration of other appliances than the rope in question, as this is within the legal definition of an "appliance" and the evidence as to the condition of the rope and no other appliance, would effectually limit the plaintiff's recovery to defects causing injury therefrom.¹

§ 169. **Erroneous charge, upon duty to warn employees.** — An instruction in an action for injury from a failure to warn the employee, that if the accident resulted from any cause which might reasonably have been guarded against and was due to dangers incident to the work, which the employer knew or ought to have known, and the dangers were unknown to the employee, which the employer knew, or should have known, and the employer failed to warn the employee thereof, then the jury should find for the plaintiff, was erroneous, because it held the employer to a duty to give warning of dangers that the employer did not actually know and authorized a recovery for causes not alleged in the complaint.²

§ 170. **Instruction withdrawing custom from jury error.** — Where, in an action for injury from falling slate from the roof of a coal mine, both the defendant and the plaintiff had introduced evidence as to the custom in inspecting and trimming the roofs of mines in the same locality, and upon whom the duty of inspection and trimming, by custom, was devolved, it was held to be error,

¹ *Illinois Steel Co. v. Wierzbicky*, 107 Ill. App. 69; 206 Ill. 201; 68 N. E. Rep. 1101.

² *Roche v. Llewellyn Iron Works*, 140 Cal. 568; 74 Pac. Rep. 147.

for the court, in charging the jury, to instruct them that they should not consider the evidence of such respective customs, for the purpose of showing want of negligence on the part of either the plaintiff or the defendant, as it was practically a denial to the defendant of its evidence of custom, it negatived the idea that if the defendant owed no duty as to the roof, it was not negligent and was calculated to lead the jury to believe that the evidence of custom had no bearing upon the negligence or contributory negligence in issue.¹ Nor would such error, in the giving of this instruction, be cured by the giving of another instruction that if the duty of inspection and repair devolved on the plaintiff he could not recover, for the absence of the evidence of custom might have led the jury to resolve this issue against the defendant.²

§ 171. **Erroneous instruction on credibility of witnesses.**—In most of the States of the United States, the jury are the sole judges of the credibility of the

¹ *Thayer v. Smoky Hollow Coal Co.* (Iowa, 1903), 96 N. W. Rep. 718.

² In an action by an employee in a coal mine for injuries sustained owing to the fall of slate from the roof of an entry, the court instructed that evidence had been introduced tending to prove a custom that a miner should look after the safety of the roof, but that the evidence should not be considered as tending to prove absence or want of negligence on the part of the defendant and that the plaintiff had introduced evidence tending to show the custom of miners, which evidence should not be considered as showing absence of negligence on the part of plaintiff. *Held*, that the instruction was erroneous, since it deprived defendant of the benefit of its evidence as to custom, negatived the idea that if defendant owed no duty as to the roof it was not negligent, no matter what it omitted, and might have led the jury to believe that the evidence as to custom had no bearing on the issue as to negligence or contributory negligence. *Thayer v. Smoky Hollow Coal Co.* (Iowa, 1903), 96 N. W. Rep. 718. The error was not cured by an instruction that, if the duty of inspection and repair devolved on plaintiff, he could not recover, and, if it devolved on defendant, plaintiff could not recover without showing some negligence, either of omission or commission. *Thayer v. Smoky Hollow Coal Co.*, 96 N. W. Rep. 718.

witnesses and of the weight to be given to their testimony and it is customary to instruct them that if they believe that any witness has willfully sworn falsely upon any material fact, the jury, in their discretion, may discredit such witness, by disregarding the whole or any part of such witness' testimony. The essential element which must exist in order for them to discredit a witness is the "willful or intentional" false swearing, as to a material fact, by any witness in the case, and an instruction which omits this element and enables the jury to disbelieve any witness who may merely have sworn falsely, as where he might have been honestly mistaken, is reversible error, as recently held by the Court of Appeals, in Missouri.¹

§ 172. **Erroneous instruction on shifting of belt.** — In an action by an employee, it is error for an instruction to assume the existence of any facts material to the plaintiff's recovery, or that any disputed facts have been established by him, as this is calculated to mislead the jury to the disadvantage of the defendant. Accordingly, in an action for an injury to an employee, from the shifting of a belt, in pursuance of an alleged negligent order of a foreman, an instruction that "if the plaintiff was ordered by the foreman to shift the belting of his machine, and did not know of or appreciate the danger of obedience, if any, and, by reason of his attempt to obey the order of the

¹ Jackson v. Powell (Mo. App. 1905), 84 S. W. Rep. 1132. "In an action for injuries to a servant, a requested instruction that if the jury believed the testimony given by plaintiff in a former action by a fellow-servant, injured in the same accident, against defendant, that plaintiff had seen flames, sparks, etc., issuing from the explosion doors of defendant's blast furnace a good many times, then they must ignore his testimony in the cause on trial that he had never seen the flames and sparks issue from such doors, was improperly refused." O'Leary v. Buffalo Union Furnace Co. (N. Y. Sup. 1905), 91 N. Y. S. 579.

foreman, he was injured, then the defendant was guilty of negligence and the plaintiff is entitled to recover," is erroneous, in omitting all reference to the plaintiff's contributory negligence, the authority of the foreman to give the order in question and the defendant's exercise of reasonable care, in the furnishing of its appliances.¹

§ 173. **Instruction on assumed risk should not limit defense to danger threatening immediate injury.**—There is perhaps no subject known to the law upon which there is a wider divergence, among the considered cases, than that on the doctrine of assumed risk, and the courts not only of different States are in irreconcilable conflict, as to what dangers are and what ones are not assumed and how the question is to be determined, but the opinions of the courts of the same State are also opposed to each other, and it is impossible to harmonize all the adjudications upon the subject. As an illustration of the conflict existing upon this one doctrine of the law—an evidence of the fact that the system of laws administered, are not reduced to anything like an exact science—a few cases in the State of Missouri alone may be considered. In many of the decisions of the past few years the doctrine has been announced that only those apparent or obvious risks will be held to be assumed by the employee, as a matter of law, where immediate or pending danger is threatened and that if the danger is not so threatening, the question will be

¹ *Killelea v. California Horseshoe Co.*, 140 Cal. 602; 74 Pac. Rep. 157. In an action by a servant for injuries, an instruction that if plaintiff was ordered by the foreman to shift the belting of his machine, and did not know of and appreciate the danger of obedience, if any, and by reason of his attempt to obey was injured, then defendant was guilty of negligence, "and plaintiff is entitled to a verdict," is erroneous, as omitting all reference to contributory negligence, the foreman's authority, defendant's having furnished safe appliances, etc. *Killelea v. California Horseshoe Co.* (Cal. 1903), 74 Pac. Rep. 157.

one of fact for the jury as to whether the risk was or was not assumed.¹ The recognition of this doctrine finally gave expression to the additional one that assumed risk is always a jury question, in Missouri,² and that latter expression of the court, along with the doctrine that if the injured employee, when injured, had reason to believe, as a prudent man, that he could safely continue his labor without immediate injury, the risk would not be assumed, but otherwise it would be,³ no doubt prompted the recent decision, which is a return to the common law doctrine, that all risks, ordinarily incident to the employment, are assumed, whether threatening immediate injury or not; that such a limitation of the defense is paring it down to a more narrow margin than the law recognizes and that an instruction so limiting the defense is not the law in Missouri.⁴

¹ *Larson v. Mining Co.*, 71 Mo. App. 512; *Smith v. Little Pittsburg Mining Co.*, 75 Mo. App. 182; *Robbins v. Big Circle Co.*, 105 Mo. App. 78; *Angelo v. Coal Co.*, 74 S. W. Rep. 714; *Ohio Valley Coal Co. v. McKinley*, 83 S. W. Rep. 186.

² *Hammon v. Central Coal & Coke Co.*, 156 Mo. 232, and cases cited.

³ *Hamilton v. Coal Co.*, 108 Mo. 377; *Prophet v. Kemper*, 95 Mo. App. 224; *Hollerin v. Iron Co.*, 183 Mo. 470.

⁴ *Minnier v. Sedalia &c. Co.*, 167 Mo. 94.

CHAPTER IX.

ASSUMPTION OF RISK, BY MINERS.

- SECTION 174.** Assumed risks in general.
- 175. Youth of employee immaterial.
 - 176. Dangers from appliances and methods assumed.
 - 177. Employer's methods — Obvious dangers from assumed.
 - 178. Concurrent negligence of master and fellow-servant not assumed.
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 - 199. Employee injured while off duty.
 - 200. Injuries from accidents are assumed.
 - 201. Dangers from unguarded cogs and set screws.
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 - 203. Risks obvious to one of employee's experience are assumed.
 - 204. Use of cars and tramways.
 - 205. Dangers from breach of statutory duty.
 - 206. When assumption of risk jury question.

§ 174. **Assumed risks in general.** — What is generally understood by the doctrine of assumed risk, as applied in the law of master and servant, is the implied contract of the common law, on the part of the employee, in entering into a given employment, that he will assume all the risks incident to such employment, which are obvious, or with which he could become familiar by the exercise of due care.¹ The application of the principle extends alike to all

¹ Buswell Per. Inj., Sec. 204, p. 339. See the leading case of *Priestly v. Fowler*, 8 M. & W. 1. Assumption of risk involves two elements — knowledge of the defect and appreciation of the danger. *Stomme v. Hanford Co.*, 108 Iowa, 187; 78 N. W. Rep. 841. Whether a given risk is assumed or not, depends largely upon the facts of each particular case. *Frank v. Bullion Beck Min. Co.*, 19 Utah, 35; 56 Pac. Rep. 419; 5 Am. Neg. Rep. 733. See *Ashland Coal &c. Co. v. Wallace*, 101 Ky. 626; 42 S. W. Rep. 744. A servant is under as great duty as the master to prevent injury to himself, by using ordinary care. *Russell Cr. Coal Co. v. Wells*, 96 Va. 416; 31 S. E. Rep. 614. The servant is not bound to ascertain all the dangers, but must use reasonable care to do so. *Holman v. Kemp*, 70 Minn. 422; 73 N. W. Rep. 186. A convict who is leased out by the State to an employer cannot recover for injuries which he sustains by having voluntarily placed himself in a position of danger, but, as he does not engage in the service of his own free will, he does not assume the risks visible in, and ordinarily incident to, the service, which a free man engaging therein would be charged with having assumed. (C. C.) *Simonds v. Georgia Iron & Coal Co.*, 133 Fed. Rep. 776, judgment affirmed, *Georgia Iron & Coal Co. v. Simonds* (U. S. C. C. A., Ga. 1904), *Id.* 1019. An employer is not bound to anticipate dangers, which one skilled in the business could not foresee. *Beasley v. Transfer Co.*, 148 Mo. 413; 50 S. W. Rep. 87. But should use all appliances, readily obtainable, to prevent the occurrence of accidents. *Western Coal Co. v. Berberich*, 94 Fed. Rep. 329. An employee assumes the risk of a cause not discoverable in advance, whether in machinery. *Bradbury v. Kingston Coal Co.*, 157 Pa. St. 231; 27 Atl. Rep. 400. Or in defect of a roof. *Bennett v. Iron Co.*, 9 Utah, 291; 34 Pac. Rep. 61. "A servant does not assume risks which are not ordinarily connected with the service, and which are due to a failure of the master to exercise reasonable care and prudence." *Montgomery Coal Co. v. Barringer*, 100 Ill. App. 185. The employer is entitled to conduct his business in his own way although not the safest and if he removes latent dangers, or advises the employee about these, he is not liable for an injury. *Bethlehem Iron Co. v. Weiss*, 100 Fed. Rep. 45.

vocations, where the relation of employer and employee exists, and the risks assumed necessarily differ with the character and extent of the business and the methods and caution of the employer. In the more dangerous kinds of business, the number and extent of the risks assumed are necessarily augmented, but whatever dangers are incidental to the service performed, are assumed by the employee, in entering into the employment.¹

§ 175. **Youth of employee immaterial.** — So generally is the principle applied, in actions for personal injuries to employees, that the mere fact of the youth or inexperience of the injured employee will not exempt him from the operation of the rule, but as to all obvious risks, which a person of the employee's years and experience ought to observe and understand, he is held, by virtue of his contract of employment, to assume, in law.² But the youth

¹ "The principle is that where the servant has as good an opportunity as the master to ascertain and avoid the danger for himself, he will have no recourse against the master, in case he is injured thereby." *Buswell Per. Inj.*, Sec. 204, p. 336; *Bailey Mas. Liab. Inj. Serv.*, p. 145. "The servant assumes the risk of every danger belonging to the work itself; but if the master's negligence aggravates such danger, and the servant is injured thereby, he may recover." *Nash v. Dowling*, 98 Mo. App. 156. "While the employee assumes the known risks of his employment, he assumes them with all of their qualifications, which include the exercise of the care which the employer is accustomed to use to obviate or minimize the danger from such risks." *Rockport Granite Co. v. Bjornholm*, 115 Fed. Rep. 947. "It was not error of which plaintiff could complain for the court to fail to charge at plaintiff's request that if the jury found that the danger, while not so threatening and obvious as likely to cause injury at any moment, was so imminent and manifest as to prevent a reasonably prudent man from risking it on a promise of assistance, defendant would not be liable." *Rocchia v. Black Diamond Coal Min. Co.*, 121 Fed. Rep. 451.

² *Rummell v. Dilworth*, 111 Pa. St. 343; *South v. Irwin*, 51 N. J. L. 507. In *Williams v. Belmont Coal & Coke Co.* (W. Va. Sup. Ct. of App., Feb. 1904), 46 S. E. Rep. 802, "a boy of fifteen and one-half years, of at least ordinary intelligence, assisting in a mine, was killed by a

and want of experience, on the part of an injured employee, would be proper subjects for consideration in determining whether or not the danger ought to have been anticipated by one of his years and experience and, in cases of doubt, on the part of the trial court, as to whether the danger, in a given case, should, or should not have been anticipated, it would be proper under appropriate instruc-

motor car in a dark tunnel. His father had warned him to be careful. The court held a minor could assume known and apparent risks and dangers when he understands them. A judgment for the defendant was affirmed." 16 Am. Neg. Rep. 152. "Where a minor servant, under the circumstances of his employment, ought to have known and comprehended the danger from certain uncovered cogwheels while attempting to work a valve on an engine he was employed to fire, he assumed the risk of injury therefrom." *Upthegrove v. Jones & Adams Coal Co.* (Wis. 1903), 96 N. W. Rep. 885. "Where a boy 17 years old, employed to carry rivets from a forge to other workmen, knew that an unguarded shaft lay along his path, and elected to continue his work notwithstanding the danger, he assumed the risk." *Terry v. Schmidt* (U. S. C. C. A., N. Y. 1902), 116 Fed. Rep. 627. "A minor assumed the risk of such apparent dangers as he is capable of comprehending, and in a suit against his employer for alleged negligence it must be shown that his death was occasioned by negligence other than such apparent danger." *Williams v. Belmont Coal & Coke Co.* (W. Va. 1904), 46 S. E. Rep. 802. "A boy about 15 years old and of ordinary intelligence who had worked with his father in the mine and has used a tunnel leading to it in going and returning from his work, who started alone through such tunnel after warning by his father, and was killed by the motor hauling coal therein, assumed the risk." *Williams v. Belmont Coal & Coke Co.* (W. Va. 1904), 46 S. E. Rep. 802. A minor employee assumes such risks as are obvious, or have been pointed out to him. *Smith v. Irwin*, 57 N. J. L. 507; 18 Atl. Rep. 852. But a minor would not assume the dangers from a scaffold falling, if it was built by his superior employees. *Eddy v. Aurora Min. Co.* (Mich.), 46 N. W. Rep. 17. A minor who obtains employment by representing himself to be of age, assumes the risks the same as an adult. *Lake Shore &c. Co. v. Baldwin*, 10 O. C. D. 383. A boy of ten was held not capable of assuming the risk of injury from obeying an order to couple coal cars, as the master impliedly agreed to require no work of him beyond his capacity. *Brazil Block Coal Co. v. Gaffney*, 119 Ind. 455; 21 N. E. Rep. 1102. See also, *Hickey v. Taafé*, 99 N. Y. 204.

tion,¹ to submit the question to the jury, as an issue of fact.²

§ 176. **Dangers from appliances and methods assumed.** — A mine owner has the legal right to adopt his

¹ *Brazil Coal Co. v. Gaffney*, 119 Ind. 455; *Smith v. Irwin*, 51 N. J. L. 507. A boy of fourteen does not assume the risk of obeying an order of the foreman to run and throw away an ignited stick of dynamite. *Orman v. Mannix*, 17 Colo. 564; 30 Pac. Rep. 1037; 17 L. R. A. 602; 31 Am. St. Rep. 340. A mine owner is liable for a negligent order of his foreman to an infant, although it would be an assumed risk, in case of an adult, if of experience in the business. *Mahood v. Coal Co. (Utah)*, 30 Pac. Rep. 149; *McLean Coal Co. v. McVey*, 38 Ill. App. 158. A ten-year-old boy at work in a coal mine is too young to assume the risk of obeying a negligent order to couple coal cars. *Brazil Block Coal Co. v. Gaffney (Ind.)*, 21 N. E. Rep. 1102; 4 L. R. A. 850. A company will be liable to the parents of a minor employee, for changing his employment, without their knowledge, whereby his peril is increased. *Weaver v. Iselin*, 161 Pa. St. 386; 29 Atl. Rep. 49. But an employer will not be liable for an injury to a boy sixteen years old, because he was put to work near an overhanging ledge of rock, if the danger was obvious and there was nothing to show that the boy did not appreciate it fully. *Williamson v. Marble Co. (Vt.)*, 29 Atl. Rep. 669. But see *contra*, *Lynch v. Allyn*, 160 Mass. 248; 35 N. E. Rep. 550. See, also, *Cherokee Coal Co. v. Britton*, 8 Kan. App. 292; 45 Pac. Rep. 100. An inexperienced boy will not assume the risk of injury from a defect in a tramway over which he runs cars to and from the mine. *McNamara v. Logan (Ala.)*, 14 So. Rep. 175. But see as to experienced employee, performing similar duty. *Beckman v. Coal Co. (Iowa)*, 57 N. W. Rep. 889. "The doctrine or assumption of known risks is applicable to minors, where there is positive evidence that the risk in question was understood." *Williams v. Belmont Coal & Coke Co.*, 46 S. E. Rep. 802.

² *Sanborn v. Flume Co.*, 70 Cal. 261. The length of time the employee has been engaged may also be taken into consideration. *Kery v. De-Castro Co.*, 5 N. Y. Supp. 548, 9. In *Merrifield v. Maryland Gold Quartz Co. (Cal. Sup. Ct., April, 1904)*, 70 Pac. Rep. 710, a minor of eighteen and one-half years of age, a shoveler on the dump regularly, was sent to work without previous experience in putting the cam on a shaft. "He let his end of one of them fall, and was caught by one of the revolving cams by the heel and dragged in. An order denying a new trial was reversed. The court said that the questions of whether the character of the work called for special instructions how to perform it, whether such were given, and whether the servant should have been cautioned as to the danger, were for the jury to pass on." 16 Am. Neg. Rep. 142.

own methods for the regulation of his business and an employee who enters or remains in his service, without promise of a change in the conduct of the business, is held to assume the risk, although a safer method might have been employed.¹ Likewise, the law recognizes an employer's prerogative to select the peculiar kind of machinery and appliances that he may deem best suited to his business—where the law does not regulate his duty in this regard—and an employee who elects to remain in his service and use such appliances, assumes the risk of injury therefrom although safer appliances might have been provided.²

§ 177. Employers' methods—Obvious dangers from assumed.—To such an extent does the law recognize the right of an employer to consult his own judgment as to the methods of conducting his own affairs, that an employee is held to assume the risks of injury from the methods or appliances in vogue, when he enters into the employment, even though the dangers from

¹ Bailey, *Mass. Lia. Inj. Serv.*, p. 146. An employer has a right to carry on his business as he sees fit even if some other method would be safer, so long as he does not violate the law, or expose his employee to dangers he is not aware of and cannot discover, by reasonable diligence. *Osborne v. Lehigh Valley Coal Co.*, 97 Wis. 27; 71 N. W. Rep. 814. "In an action for injuries to a miner from alleged defects in hoisting machinery, an objection to a question asked the mine superintendent as to whether he knew the depth of shaft in view at the time the company first placed the machinery, is properly sustained, though its purpose was to show that the shaft was sunk to a greater depth than was at first intended, and for which the appliances were inadequate." *Luman v. Golden Ancient Channel Min. Co.*, 74 Pac. Rep. 307. A skilled employee using a ladder without spikes in the bottom, as a result of which it slipped and injured him, cannot recover for such injury. *Borden v. Daisy Mill Co.*, 98 Wis. 407; 74 N. W. Rep. 91; *Rietlman v. Sulte*, 120 Ind. 814.

² *Stephenson v. Duncan*, 73 Wis. 406; 41 N. W. Rep. 337; *Gilbert v. Guild*, 144 Mass. 601; 12 N. E. Rep. 868.

the methods or appliances in use are increased by the employer's failure to use the safest, if the dangers therefrom are obvious, or incidental to the business, as he conducts it.¹ The duties of the mine owner, as specified in the previous chapter, exist only in those cases where

¹ *Lord v. Pueblo Sm. & Min. Co.*, 12 Colo. 390; *Abbott v. McCadden*, 81 Wis. 568; 51 N. W. Rep. 1079. "An employee must take notice of obvious dangers, but he is not under the necessity of hunting for them." *Illinois Steel Co. v. Mann*, 100 Ill. App. 367; affirmed 64 N. E. Rep. 328. "Where the dangers against which it was alleged a master had negligently failed to warn a servant, whereby the servant was injured, were such that the servant had equal means with the master of knowing of them, the master was not liable." *Cartledge v. Plerpont Mfg. Co.*, 47 S. E. Rep. 586. "Plaintiff was injured by the falling of a stone which he was cutting in defendant's stone-yard. In order to facilitate the cutting, the stone was tilted up by means of stone chips placed beneath it on blocks, in accordance with custom. Plaintiff had worked on the stone for four or five days prior to the accident, but was not present when it was last tilted up. Plaintiff testified that he knew that if the stone was not properly propped he would get hurt and that he made no effort to inform himself as to how it was propped. When the stone fell, plaintiff had finished working on it, and was leaning over or upon it, in the act of picking up some tools or a match. Held, that the risk that the stone might fall was obvious, and one which plaintiff assumed." *Archambault v. Archambault* (Mass. 1903), 68 N. E. Rep. 199. An employee in a mine assumes the risk of obviously steep, dangerous stairs, he is obliged to use. *Sweet v. Coal Co.* (Wis.) 78 Wis. 127; 47 N. W. Rep. 182; 9 L. R. A. 861; *Krampe v. St. Louis Ass'n*, 59 Mo. App. 277. But see, where stairs are greasy, dark, or icy, *Harding v. Trans. Co.*, 88 N. W. Rep. 395; *Kline v. Abrahams*, 178 N. Y. 377; 70 N. E. Rep. 923; 7 Am. Neg. Rep. 554. The negligence of the master is held not to be a risk assumed by the miner, in *Hone v. Mammoth Min. Co.*, 75 Pac. Rep. 381. "A servant does not assume risks not ordinarily connected with his service and which arise from the failure of the master to exercise reasonable care." *Riverton Coal Co. v. Shepherd*, 111 Ill. App. 294. "While a person entering voluntarily into a contract of service assumes all the risks and hazards ordinarily incident to the employment, and such as are liable to arise from defects which are patent and obvious to a person of his experience and understanding, he does not ordinarily assume risks arising out of the negligence of the master." *Bunker Hill & Sullivan Mining & Concentrating Co. v. Jones*, 130 Fed. Rep. 813.

his peculiar methods or manner of conducting his business are not known to his employee, or where the law would not charge him with such notice, considering his experience and the peculiar service rendered.¹ Where an employee knows of an alleged violation of duty on the part of his employer and also knows of the danger connected therewith, or where the danger is so obvious that the law would charge him with the knowledge thereof, then he assumes the risk of an injury from such a cause, although it may be traceable to the negligence of his employer.²

§ 178. **Concurring negligence of master and fellow-servant not assumed.** — The authorities are very generally agreed upon the proposition that an employee does not

¹ Bailey, Mas. Liab. Inj. Serv., pp. 148, 149.

² Lord v. Pueblo Sm. & Min. Co., 12 Colo. 39. "Plaintiff, employed at a lime kiln, around which were four iron bands, was injured by one of them, which broke from the shirring off of the rivets, caused by the expansion of the kiln under the heat. A band had broken several months before, and plaintiff had told the foreman that they must be loosened, or he would cease work, and the foreman had said he would see that it was attended to at once. The superintendent also said he would have them loosened, and as soon as he got material would have guards put up, and four uprights were thereafter erected as guards to prevent a band flying out in case of a break. While the bands were not loosened, plaintiff testified that he did not know it, and supposed that when they said they would loosen them that they did it, and that from where he worked one could not see whether they had been loosened. *Held*, that it could not be said as matter of law that the risk was an obvious one and assumed." Schermerhorn v. Glens Falls Portland Cement Co. (N. Y. Sup. 1904), 88 N. Y. S. 407; 94 App. Div. 600. "It was not error to refuse an instruction that an employee could not recover for an injury alleged to have resulted from the negligence of the master, in failing to make proper examination and test of a ledge of rock before a blast was made, if he 'had as good an opportunity as defendant's superintendent to examine the situation,' where he was not charged by his employment with any duty in that respect, and the defect which caused the accident was not so obvious that he must be held to have known of it as matter of law." Rockport Granite Co. v. Bjornholm, 115 Fed. Rep. 947.

assume the risk of an injury resulting from the concurrent negligence of the employer and a co-employee of the injured servant,¹ but where the negligence of the employer combines with that of a fellow-servant to produce an injury to an employee, the mere concurrence of the co-employee's negligence, will not relieve the master from liability, if the danger was not obvious or known. The master would, accordingly, be liable for an injury resulting, whenever he had been negligent in furnishing an unsafe place or appliance, or adopting a dangerous rule, and a co-employee had also been negligent in the manner of his work, or the use of the appliance, or a compliance with the rule or order, and, as a result of such concurrent negligence, the injury was occasioned.² For instance, in Massachusetts, it is held, that if an employer provides defective lumber for a scaffolding, he will be liable in case of injury to an employee, where a fellow-servant of the injured employee had used the defective material.³ The same rule applies, in the use, by a co-employee, of a defective or dangerous implement or appliance,⁴ and the rule is general that such risks are not assumed.⁵ But if the negligence of a fellow-servant was the approximate cause of the injury and the employer's negligence only remotely contributed thereto, the injured employee will be held to have assumed the risk,

¹ *Anilla v. Nash*, 117 Mass. 318; *Lane v. Atlantic Works*, 111 Mass. 186; *Joyce v. Worcester*, 140 Mass. 245; *Atkinson v. Goodrich Co.*, 60 Wis. 141; 18 N. W. Rep. 764; *Boyce v. Fitzpatrick*, 80 Ind. 526.

² *Bailey's Mas. Liab. Inj. Serv.*, pp. 443, 444.

³ *Clark v. Soule*, 137 Mass. 380.

⁴ *Sherman v. Menominee River &c. Co.*, 72 Wis. 122; 39 N. W. Rep. 365.

⁵ *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Perry v. Marshall*, 25 Ala. 659; *Buswell Per. Inj.*, Sec. 215, p. 371; *Pantzear v. Tilly Foster Iron Min. Co.*, 99 N. Y. 368; *McMahan v. Hanning*, 3 Fed. Rep. 353; *Hinckley v. Horazduski*, 133 Ill. 359; *Bartonshill Coal Co. v. McGuire*, 3 Macq. 300; *Coombs v. New Bedford Co.*, 102 Mass. 572; *Haugh v. T. & P. Co.*, 100 U. S. 213.

unless the master was careless in employing the fellow-servant.¹

§ 179. **Necessity for knowledge of danger.** — The question of the assumption of a given risk, in his employment, by an employee, often depends upon his knowledge of the danger with which he comes in contact. The law does not charge all employees, regardless of their experience or surroundings, with a knowledge of all the dangers encountered in their employment,² but if the given danger was

¹ Buswell Per. Inj., Sec. 215, p. 373; Bailey Mas. Liab. Inj. Serv., p. 448.

² Buswell Per. Inj., Sec. 204, p. 340. "In an action against the owner of a mine for wrongfully causing the death of a minor, the complaint alleged that defendant's mine boss was notified of the insecure condition of the roof of the mine, and that it was his duty to make it safe, but that he failed to do so, and, some time after learning of the dangerous condition, ordered deceased, who had no knowledge that the place was unsafe, but assumed that the boss had visited the place, and that it was not dangerous, to locate the dangerous roof and prepare to make it safe. While executing the order deceased was killed. *Held*, that the fact that the place was not inspected and made secure before the accident was immaterial, in view of the fact that the injury did not occur until after deceased knew of the danger." *Indiana & C. Coal Co. v. Batey* (Ind. App. 1904), 71 N. E. Rep. 191. "Plaintiff was injured by an explosion in a mine which occurred before plaintiff and his fellow-workmen had been hoisted a sufficient distance up the shaft after spitting the fuse to avoid danger, and plaintiff claimed that the fuse furnished by defendant that day was quicker than fuses previously furnished, and that defendant had not informed plaintiff that a change in the fuses generally used had been made. As to whether the fuse was quicker, and known to be so by defendant's agent, and whether the difference was discernible in the mine, and whether plaintiff or any of his companions knew or could have known thereof, the evidence was conflicting. *Held*, that a verdict for plaintiff was not unsupported by the evidence." *Hedlun v. Holy Terror Min. Co.* (S. D. 1902), 92 N. W. Rep. 81. "Where a miner was directed down an inclined chute for the purpose of putting in lagging, and requested that a rope be furnished to prevent falling, and at the direction of the superintendent the miner himself placed a rope in the chute, which was subsequently removed by a fellow-servant, and the miner continued to work with knowledge of such removal, and was injured by falling, he

understood,¹ or if from the experience and surroundings of the employee it ought to have been, it is assumed, as a risk incident to the business.²

assumed the risk, and was not entitled to recover therefor." *Bunker Hill & S. Mining & Concentrating Co. v. Kettleson*, 121 Fed. Rep. 529. "Where a servant of a coal company, after loading a cart with coal from a car, the end of which swung on hinges, attempted to leave the car by climbing over the end, which fell in, breaking one of his legs, his injury was due to his own negligence in attempting to leave the car in that way, as steps were provided at the side of the car, and, besides, he might by the exercise of ordinary care, have discovered that the car was sprung and that the end was not secured either by the iron hooks provided for the purpose or by blocks of wood sometimes substituted for the hooks." *Tradewater Coal Co. v. Head*, 66 S. W. Rep. 721. "Where in an action for injuries to a miner by the fall of coal in a room in which he was directed to work, he testified that he did not discover the dangerous condition of the roof before the injury, but relied on the assurance of defendant's room dresser, who had authority over plaintiff, that the room in which he was directed to work was safe, plaintiff was not guilty of contributory negligence, as a matter of law, in failing to discover the danger from the coal by which he was injured." *St. Bernard Coal Co. v. Southard* (Ky. 1908), 76 S. W. Rep. 167; 25 Ky. Law Rep. 638.

¹ *Aldrich v. Furnace Co.*, 78 Mo. 539. "While plaintiff's intestate was employed with a large number of other men, in getting out stone in a quarry on a hillside, a rock which had been loosened, probably, by some previous blast, fell on him, causing injuries from which he died. The evidence showed no lack of due care on the part of his employers and their servants in respect to any duty owed by them, and, if there was any negligence by any one, it was that of deceased or of his fellow-servants in the performance of a detail of the work. *Held* that a verdict was properly directed for defendants." *Trapasso v. Coleman*, 76 N. Y. S. 798.

² *Boemer v. Lead Co.*, 69 Mo. App. 601. "The workings in a mine included a shaft 427 feet deep. Two small wooden buildings, used as bunkhouses, stood at the mouth of the tunnel; the space between them being roofed. There were no special appliances for extinguishing fire, or any bulkhead or other means for checking it. Plaintiff's decedent had been in the employ of the mining company about a month. He was thirty-six years of age, and of good intelligence. He lodged in the bunkhouse, knew its construction and use, and knew the general construction of the mine, and of the absence of fire protection. Fire started in the bunkhouse, through the negligence of a fellow-employee, while decedent was in the shaft below the tunnel, and he was burned to death.

§ 180. **Same — Known dangers are assumed.** — When a miner knows of a defective condition of either the ground or appliances of his employer and is also familiar with the danger resulting therefrom, in the absence of an assurance of safety from his employer, he assumes the risk of injury therefrom.¹ But a mere knowledge of a defect in the ways

Held, that he had assumed the risk." *Harvey v. Mountain Pride Gold Min. Co.*, 70 Pac. Rep. 1001. "In an action for injuries to a servant caused by a car falling from the tracks on an incline by reason of the rails being too close together, evidence examined, and held sufficient to show that the dangerous condition was not one of which plaintiff had, or should have had, knowledge." *Momence Stone Co. v. Turrell*, 68 N. E. Rep. 1078; 205 Ill. 515. The courts of last resort in Missouri have practically adjudicated away the defense of assumed risk, by holding that, if the "plaintiff had reason to believe that, by due care on his part he could continue in the service, without injury, then it is for the jury to say whether or not he assumed the risk of injury." *Hamman v. Coal Co.*, 156 Mo. 232 and cases cited. The plaintiff always has such belief, or the jury so finds, and the defense is practically abolished by judicial holding in this State. "It being the law and the contract, that the servant ought to know that which was plain to be seen, and which it was a part of his duty to learn and know, how then, can it be said that the jury are to determine whether or not he had knowledge." The above pertinent query, by Judge Bailey (page 181, *Mas. Lia. Inj. Serv.*), applies peculiarly to a rule which practically permits an employee to say that he did not assume the most obvious danger. It was said in the early leading case of *Priestly v. Fowler* (3 M. & W. 1), that the servant is bound to take as great precaution for his own safety, as he could expect another to take for him and, if this is true, and the employee could, as a reasonable man, properly continue his work, with full knowledge of the surrounding conditions, then it is certainly a fiction to hold the master negligent in permitting him to so continue.

¹ *Aldrich v. Furnace Co.*, 78 Mo. 559; *Mooney v. Coal Co.*, 55 Iowa, 671; 10 Mor. Min. Rep. 56; *Heald v. Wallace* (Tenn.), 71 S. W. Rep. 80; *Zinc Co. v. Bell* (Kan.), 68 Pac. Rep. 609. "Where a servant discovers a danger, he is bound only to notice and consider it with reference to his personal safety while engaged in his then employment, and, in case it renders the surroundings dangerous to him, he must give notice of the fact to the master." *Montgomery Coal Co. v. Barringer*, (Ill. App. 1903), 109 Ill. App. 185. A mine owner will not be liable for a violation of the Indiana statute, requiring inspections every other day (R. S. Ind. 1894, Sec. 7472), for a fall of coal from the roof of a drift, where

or appliances of the master, will not, usually, defeat a recovery, in case of injury therefrom, but both a knowledge of the defective condition of the place or appliance and an understanding of the resulting danger, as well, are necessary to bar a recovery.¹

the injured employee was an experienced miner and had himself tested the roof, just before his injury. *Island Coal Co. v. Greenwood*, 151 Ind. 476; 56 N. E. Rep. 36; 4 Am. Neg. Rep. 146; see also, *Finalyson v. Utica Min. Co.*, 67 Fed. Rep. 507. "The complaint for death of defendant's employee alleged that defendant was negligent in fixing a guy rope on a derrick so low and in such a position that when the boom was turned to the south it would slacken the guy so that it would catch stone on a dump car as it was being pushed along a tramway under it, and throw it off on employees, and that by reason thereof the place behind the car became dangerous to the employees; and that defendant, well knowing the dangers of slacking said guy, and that deceased was engaged in moving the loaded car beneath it, suddenly, and without knowledge of deceased, so slacked said guy that it, instantly and suddenly caught a stone on said car, and threw it, killing deceased. *Held* insufficient, it not showing that the negligence charged was the cause of the guy slacking, and not alleging that deceased was without knowledge of the dangers incident to the negligence charged." *Consolidated Stone Co. v. Staggs* (Ind. App. 1904), 71 N. E. Rep. 161. A master is not required to furnish the servant with a safe place to work as against a danger which is temporary, and arises from the hazard and the progress of the work itself, and is known to the servant, who in such case assumes the risk therefrom. *Davis v. Trade Dollar Consol. Min. Co.* (U. S. C. C. A., Utah, 1902), 117 Fed. Rep. 112.

¹ *Boyer v. Coal Co.*, 68 Pac. Rep. 348; *Graham v. Coal Co.*, 30 W. Va. 278; *Cushman v. Carbondale Co.*, 88 N. W. Rep. 817; *Hammon v. Coal Co.*, 156 Mo. 282; *Smith v. Coal Co.*, 75 Mo. App. 177. In *Welch v. Bath Ironworks* (Me. 1903), 57 Atl. Rep. 88, "Plaintiff was injured while digging in defendant's excavation by the explosion of fragments of dynamite cartridges which should have been completely exploded by blasts on the previous day. A verdict for plaintiff was sustained. The court said that while employers may use dangerous agencies and appliances, they are bound to use correspondingly great care to reduce inherent dangers to a condition of reasonable safety. The employer is bound to give his servant full information of the particular danger arising from the use of extraordinary hazardous agencies to enable them to intelligently select such employment and to avoid its risks. Such a duty can not be delegated. The doctrine of assumption of risk has no

§ 181. **Same—Obvious or threatening dangers.**—The courts of some of the States have held that an employee only assumes such exceptional dangers as are obvious or those that threaten immediate injury.¹ The enunciation of this doctrine by the Missouri courts has brought about a hopeless conflict in the decisions of both the Supreme and appellate courts of the State,² upon the doctrine of assumed

application to dangers which are not and should not be contemplated by employees. The plaintiff had no knowledge or information of the particular dangers of this explosive or how to avoid them, and was not aware and had no reason to apprehend the presence of unexploded pieces of dynamite. There was evidence that unexploded cartridges are always liable to be left after a blasting." 16 Am. Neg. Rep. 140. In *McMillan v. North Star Mining Co.* (Wash. Sup., Sept. 1908), 15 Am. Neg. Rep. 203, "it was said that an employee engaged in driving a tunnel in a mine does not assume the risk of injury from an unexploded blast that was left by other employees without his knowledge when he had not been warned and could not by the exercise of reasonable observation and care have discovered the hidden danger, and under those facts a judgment for the plaintiff was affirmed." 16 Am. Neg. Rep. 141.

¹ *Hammon v. Coal & Coke Co.*, 156 Mo. 282; *Larson v. Mining Co.*, 71 Mo. App. 826; *Carter v. Baldwin*, 81 S. W. Rep. 204. An employee without actual knowledge of the nearness of a foot board to the coal chute, does not assume the risk of an injury therefrom. *Chicago & A. R. Co. v. Stevens*, 91 Ill. App. 171; 189 Ill. 226; 59 N. E. Rep. 577.

² In *Aldrich v. Furnace Co.* (78 Mo. 559), the Supreme Court held that all risks were assumed, although no actual knowledge was brought home to the employee if he had equal means of knowledge with the employer. This was followed by the appellate court in *Watson v. Coal Co.*, 52 Mo. App. 866, and *Boemer v. Lead Co.*, 69 Mo. App. 601. In *Hammon v. Coal Co.* (156 Mo. 232) the Supreme Court held that only obvious dangers were assumed and those that threatened immediate injury. This was followed in *Carter v. Baldwin* (81 S. W. Rep. 204), by the Court of Appeals, and *Larson v. Min. Co.* (71 Mo. App. 828) also recedes from the doctrine in *Watson v. Coal Co.*, and then in the still later case of *Minnier v. Sedalia &c. Co.* (167 Mo. 94) the Supreme Court reversed a case on an instruction telling the jury that only obvious risks were assumed, holding that risks not obvious were also assumed, if incidental to the service. (This latter case is, manifestly, getting back in the well beaten path of the law, as marked by able precedents. The other decisions are dangerous by-ways, leading toward unknown premises.)

risk and a recognition of only "obvious and threatening dangers" as within the employee's implied contract of employment and the additional qualification upon the obvious risks assumed by the employee, that he only assumes such as he "has reason to believe threaten immediate injury" — thereby making the employee, practically, the judge of what "obvious risks" he should assume — has rendered the defense of but little value in that State.¹ Clearly, as the doctrine existed at common law — and it is of common law origin — all risks were assumed of which the servant had equal means of knowledge with the employer, or which he should have known, by reason of his experience and surroundings, as well as those obvious risks that threatened immediate injury, and although a given danger was not obvious, if it was one arising from the usual management of the business, as customarily carried on, then such danger would be assumed by the employee, as an incident of such business.²

§ 182. Risk not assumed when danger not appreciated. — When a knowledge of the defect or act does not suggest a knowledge of the consequent danger or risk of a continuance in the service by the employee, as when the risk is not one to be ordinarily appreciated by other than a skilled employee and the injured servant is without the necessary experience to enable him to appreciate the danger, then the risk is not assumed in case of an

¹ In *Carter v. Baldwin* (81 S. W. Rep. 204) the employee saw a large crevice above the bowlder, which fell and hurt him, the day before his injury. He was a skilled miner and knew the effect of such crevice but as he thought, with due care, he could continue his work, without injury, this deprived the mine owner of his defense of assumed risk and he was compelled to make his employee whole by way of damages, for the lack of judgment on his part.

² The late case of *Minnier v. Sedalia &c. Co.* (167 Mo. 94), recognizes this as the correct rule.

injury from such a cause.¹ It has been recently held, in Michigan, that an employee does not assume the risk of an explosion, caused by a molten pot of copper coming in contact with water;² an employee has been held not to assume the danger of being scalded by a steam explosion, caused by obeying an order to throw water upon hot ashes;³ and, generally the employer should inform his employees of any danger not likely to be appreciated by one of his experience and whenever a duty to warn exists and there is a breach of such duty, then the risk of injury from the cause as to which the duty to warn existed, is not assumed by the employee.⁴ But if the employee is familiar with the defects that occasion the injury and is accustomed to the acts that cause the danger, he will be presumed, in law, to appreciate it and will be held to assume the risk,⁵ and whenever, on account of his duties and experience in the business, the employer would not be under the duty of giving a warning as to the particular danger that caused the injury, then the risk is held to be assumed.⁶

§ 183. **Equal knowledge — Risk assumed.** — If an employee has equal or superior knowledge or experience with

¹ *Bailey Mas. Lia. Inj. Serv.*, p. 186; *Sanborn v. Madera Flume &c. Co.*, 70 Cal. 261; 11 Pac. Rep. 710; *Fox v. Peninsular White Lead Works*, 84 Mich. 676; 48 N. W. Rep. 203.

² In a late case, in Michigan, it is held to be the duty of an employer to instruct an employee of the danger of a molten pot of copper exploding, when coming in contact with water and for an injury, where no instruction was given, there is a liability. *Ribich v. Lake Superior Smelting Co.*, 82 N. W. Rep. 279; 48 L. R. A. 649.

³ *Hunt v. Desloge Con. Lead Co.* (Mo. App. 1904); 79 S. W. Rep. 710.

⁴ *Hysell v. Swift & Co.*, 78 Mo. App. 39.

⁵ Judge Bailey instances several cases where the defects would suggest the injury. See *Bailey Mas. Liab. Inj. Serv.*, p. 189; *Sweet v. Coal Co.*, 78 Wis. 127; 47 N. W. Rep. 182; *McGlynn v. Brodie*, 31 Cal. 378.

⁶ *Bailey Mas. Liab. Inj. Serv.*, p. 198; *Westland v. Gold Coin Min. Co.*, 101 Fed. Rep. 59.

reference to a given defect and the danger resulting from its existence, than his employer, he assumes the risk by a continuance in the service.¹ Illustrative of this principle, in a Missouri case, a skilled employee was set to work to remove a pillar in a coal mine and he had knowledge of a defective condition of the roof. He possessed equal, or superior information in regard to the roof, than his employer, and was, consequently, held to assume the risk of injury from causes about which he possessed such understanding.² But although an employee may possess equal means of information with his employer, in regard to a given defect, if he is, on account of youth or inexperience, not so capable of understanding the resulting danger from such defect, or if his employer assures him of safety and he continues in the service, in reliance upon such assurance and is injured, he will not be held to have assumed the risk, merely because he knew of the defect.³

§ 184. **Same — Dangers from unsafe roof.** — If an employee is injured by falling slabs or bowlders from the roof of a drift, of which he had no knowledge, due to a defective condition of the roof, the employer would be liable for such injury, if he had notice of the defective condition of the roof, or by the exercise of reasonable care, could have known of it a sufficient length of time to have repaired the roof.⁴ In those States where a “ground

¹ *Balley Mas. Liab. Inj. Serv.*, p. 198: *Hoykey v. Smithville Co.*, 29 Conn. 256; *Aldrich v. Furnace Co.*, 78 Mo. 559.

² *Watson v. K. & T. Coal Co.*, 52 Mo. App. 366.

³ In *Carter v. Baldwin* (Mo. Ct. App. 1904), 81 S. W. Rep. 204, the plaintiff possessed equal means of information with the master of a dangerous crevice over a bowlder he was engaged in taking down, but on account of his youth and the assurance of the ground foreman of the mine that it was a safe place to work, he was held not to have assumed the risk of injury from the bowlder falling.

⁴ *White Mines & Min. Rem.*, Secs. 397 to 528; *Quincy Coal Co. v. Hood*, 77 Ill. 69; *Fisher v. Lead Co.*, 156 Mo. 479; *Hammon v. Cent.*

boss" is a fellow-servant with a miner, if the employer has used due care in the employment of such "boss" and to make the mine reasonably safe, he would not be liable for an injury from a falling slab or boulder, even though the "ground boss" himself had been negligent, for this

Coal & Coke Co. 156 Mo. 232; Bunker Hill Min. Co. v. Schnellling, 1 Am. Neg. Rep. 782; Ashland Coal Co. v. Wallace (Ky.), 4 Am. Neg. Rep. 88; Coal Valley Min. Co. v. Haywood, 90 Ill. App. 258; Con. Coal Co. v. Lundak, 196 Ill. 594; Harder Coal Co. v. Schmidt, 9 Am. Neg. Rep. 227; Mellsdon Coal Co. v. Smith, 10 Am. Neg. Rep., 445. "Evidence in action for injuries to servant *held* to justify a finding that the vice-principal had notice of the defective condition of the roof of a drift of the mine in which the employee was at work." Good Eye Min. Co. v. Robinson, 73 Pac. Rep. 102. "An employee in a quarry directed by his superintendent to mount on a large rock for the purpose of drilling thereon, was not bound to make a careful inspection of everything pertaining to the safety of the place." Mahoney v. Bay State Pink Granite Co., 68 N. E. Rep. 234. "Where a mine owner had employed room dressers to clear the rooms of loose material to render the same safe for miners, and given such room dressers authority to designate the rooms in which miners should work, a miner injured by the fall of coal in a room in which he was directed to work was entitled to rely upon the performance of the mine owner's duty to make the room safe after ordering him to work therein." St. Bernard Coal Co. v. Southard, 76 S. W. Rep. 167; 25 Ky. Law Rep. 638. In Borgerson v. Cook Stone Co. (Minn. Dec. 1908), 97 N. W. Rep. 734, "a workman in a quarry was injured by the fall of a rock loosened by another workman above him. He had no notice that the other man was above him or of his position near the edge of the level where he stood, nor was he warned of any danger of the liability of rocks to fall on him from above. The court held that was no assumption of risk by him." 16 Am. Neg. Rep. 141. In Wilson v. Alpine Coal Co. (Ky. Ct. of App., June, 1904), 81 S. W. Rep. 278, "judgment for defendant was reversed where a common laborer was employed in a mine under direction of an engineer, and the roof of the mine fell in and he was hurt. He had a right to assume that the defendant had properly inspected the mine's roof and properly supported it." 16 Am. Neg. Rep. 154. A risk from falling slabs is not assumed, where the roof is not kept reasonably safe. Kelly v. Fourth of July Min. Co., 16 Mont. 484; 41 Pac. Rep. 273. See also Burgess v. Sulphur Ore Co., 165 Mass. 71; 42 N. E. Rep. 501. A miner will not assume the risk of a removal of the support of one upright of a ladder, on a dark night, as the danger would not be obvious. Dryburg v. Mercury Gold Min. Co., 18 Utah, 410; 55 Pac. Rep. 367; 5 Am. Neg. Rep. 253. Failure to inspect the roof, by an

would be the negligence of a fellow-servant, assumed by the miners, as a risk incident to their employment.¹ In those jurisdictions, however, where the foreman, or "ground boss" is held to be a vice-principal, his negligence is not a risk assumed as incident to the business.² But, regardless of the

employee, of itself, will not preclude a recovery for injury from falling slate. *Blazenic v. Iowa Coal Co.*, 102 Iowa, 706; 72 N. W. Rep. 292. A miner does not, in Montana, assume the risk of injury from falling slate, where the roof is not properly propped. *Freeman v. Coal Co.*, 64 Pac. Rep. 347. Employee has a right to assume that master has made roof of mine reasonably safe. *Con. Coal Co. v. Bruce*, 47 Ill. App. 444; 87 N. E. Rep. 912; *Vanesse v. Coal Co.*, 159 Pa. St. 403; 28 Atl. Rep. 200, and see as to machinery and appliances in use, *Gisson v. Schwabacher*, 99 Cal. 419; 84 Pac. Rep. 104.

¹ *Hall v. Johnson*, 34 L. J. Ex. 222; 3 H. & C. 589; *Lehigh Valley Coal Co. v. Jones*, 10 Mor. Min. Rep. 30; *Delaware Coal Co. v. Carroll*, 10 Mor. Min. Rep. 47; *Trangear v. Coal Co.*, 62 Iowa, 576; 17 N. W. Rep. 775; *Alaska Gold Min. Co. v. Whelan*, 168 U. S. 88. "Where plaintiff was employed in removing stumps serving as roof supports in defendant's mine, defendant was not liable for injuries caused by the fall of debris from a point in the roof in such close proximity to the part of the mine where plaintiff was working as to be affected by the blasting done by plaintiff, and which caused the roof to fall, unless defendant's mine superintendent knew or should have known that such blasting would have caused the top of the mine to fall, and negligently failed to guard against its falling by propping it more securely, and plaintiff did not know, or by ordinary care could not have known, that such would be the effect of the blasting." *East Jellico Coal Co. v. Golden*, 79 S. W. Rep. 291; 25 Ky. Law Rep. 2056.

² *Carter v. Baldwin* (Mo. App.), 81 S. W. Rep. 204; *Hammon v. Coal Co.*, 156 Mo. 282. "However, if the injury occur at a place where it was the duty of the injured party, or his fellow-servants, to keep the roof safe, no action will lie, for the injury is an assumed risk; and the rule is the same if the duty and breach was that of a 'pit boss,' who, in law, would be considered a fellow-servant." *White Mines & Min. Rem.*, Sec. 451, p. 591; *Mining Co. v. Clay*, 51 Ohio St. 542; 38 N. E. Rep. 610. For a well-considered case, where there was shown to be no necessity for inspection or props for roof, and an injury, resulting in death, from falling rock from roof, was held not actionable, see Judge Bland's opinion in *Beomer v. Lead Co.*, 69 Mo. App. 601; *Tranghear v. Coal Co.*, 62 Iowa, 576; 17 N. W. Rep. 775; *Whalen v. Alaska-Treadwell Gold Min. Co.*, 168 U. S.

cause of the unsafe condition of a roof, where the danger is obvious, or the employee has a knowledge of the real condition of the roof, or, by the exercise of reasonable care, could have known of the danger, and he continues his work without objection, he is held to have assumed the risk of injuries from falling slabs or boulders and, in case of an injury, could not recover.¹

88; Delaware Co. v. Carroll, 10 M. M. R. 47; Lehigh Valley Co. v. Jones, 10 *Id.* 80. "The plaintiff, a workman in the coal mine of the defendants, received damage from the fall of a stone from the roof of the mine, which had lost its support by reason of the removal of the coal below in the ordinary course of working the mine. The defendants' underlooker, whose duty it was to superintend the mining operations, had negligently, though the danger had been pointed out to him, omitted to prop up the roof. The removal of the coal and the propping up of the roof ought, in the exercise of due and reasonable care, to be nearly contemporaneous operations: *Held*, that as there was no evidence that the defendants had not exercised due care in the selection of their underlooker, nor in putting the mine into a proper condition before the miners were sent into it, they were not answerable for the injury caused to the plaintiff by the negligence of the underlooker, his fellow-laborer." *Hall v. Johnson*, 84 L. J. Ex. 222; 3 H. & C. 589. A miner is not bound to know whether an elaborate system of timbering the roof of a mine is sufficient or not. *Eddy v. Aurora Iron Min. Co.*, 81 Mich. 548; 46 N. W. Rep. 17; *Omence Coal Co. v. Royce*, 184 Ill. 402; 56 N. E. Rep. 621; *Wellston Coal Co. v. Smith*, 65 Ohio St. 70; 61 N. E. Rep. 143; 53 L. R. A. 99. A coal car driver is under no obligation to inspect the roof. *Hancock v. Kean*, 5 Ind. App. 408; 32 N. E. Rep. 829. A mine owner cannot delegate to a miner whose duties require him to work under a roof of a drift, the duty of keeping the roof safe to the extent of relieving the mining boss of a neglect of his duty with reference to the employees under his care. *Wellston Coal Co. v. Smith* (Ohio, 1901), 10 Amer. Neg. Rep. 445.

¹ *Watson v. Kansas & Texas Coal Co.*, 52 Mo. App. 866; *Heath v. Coal Co.*, 65 Iowa, 737; *Olsen v. McMullen*, 24 Minn. 94. If an overhanging rock looks safe from where an employee is at work, it is a jury question whether or not he ought to have discovered a crevice on the other side, or out of view. *Collins v. Greenfield*, 172 Mass. 78; 51 N. E. Rep. 454; *Alton Pav. Co. v. Hudson*, 176 Ill. 570; 52 N. E. Rep. 256; *McCoy v. Westboro*, 172 Mass. 504; 52 N. E. Rep. 1064; *Murphy v. Coal Co.*, 172 Mass. 324; 52 N. E. Rep. 503. See chapter, *Falling Slabs and Boulders*. A miner assumes the risk of sitting down under a dangerous wall, which he could discover was loose. *Fowler v. Pleasant Valley*

§ 185. **Same—Dangers from natural sources assumed.** Natural destructive forces are presumed to be familiar to all men and the consequent dangers from such sources are so far held to be chargeable to all persons of ordinary intelligence that if an employee, in the possession of his ordinary faculties, is injured from such causes, he is with-

Coal Co., 16 Utah, 348; 52 Pac. Rep. 504; *Boemer v. Lead Co.*, 69 Mo. App. 601. But see, where timber boss promises to timber it, *Sugar Cr. Coal Co. v. Peterson*, 75 Ill. App. 631; reversed in 177 Ill. 324; 52 N. E. Rep. 475. An employee was held to have assumed the risk of working near a loose overhanging slab of rock or bank of earth, in *Baker v. Sutton*, 42 N. Y. Supp. 116; *Anderson v. Winston*, 81 Fed. Rep. 528; *Morbach v. Home Min. Co.*, 58 Kan. 731; *Showalter v. Fairbanks, Morse & Co.*, 88 Wis. 376. One employed to trim the roof of a mine, assumes the risk of injury from falling coal. *Muddy Valley Min. Co. v. Parrish*, 74 Ill. App. 559. But if the entry of a mine is not so dangerous as to threaten immediate injury, the Missouri Court of Appeals held, the risk would not be assumed. *Smith v. Little Pittsburg Coal Co.*, 75 Mo. App. 177. But see, *contra*, *Minnier v. Sedalia & Co.*, 167 Mo. 94. A miner who knows, or ought to know, the previous unsafe condition of a rock, assumes the danger of its falling upon him, without a promise to remedy its condition or an assurance of its safety. *Andrews v. Tamarack Min. Co.*, 114 Mich. 375; 72 N. W. Rep. 242; *Russell Cr. Coal Co. v. Wells*, 96 Va. 416; 81 S. E. Rep. 614; *Murphy v. City Coal Co.*, 172 Mass. 324; 52 N. E. Rep. 508. An old, experienced miner, familiar with the formation of the ground, assumes the risk of obeying an order of the foreman to erect a scaffold from the falling slabs or boulders. *Paule v. Florence Min. Co.*, 80 Wis. 350; 50 N. W. Rep. 189. An employee who has met with a second injury from an unsafe roof, assumes the peril. *Morgen v. Home Min. Co. (Kan.)*, 87 Pac. Rep., p. 122. "Plaintiff was engaged in driving a headway in defendant's coal mine, and was charged with the duty of pulling down or bracing up loose rocks in the ceiling of such heading. There were employees with superior authority over plaintiff, charged with general superintendence of the work, but plaintiff was primarily charged with the duty of seeing that the roof of the heading was safe, and about an hour before he was injured one of his superiors warned him that the ceiling of the heading was unsafe, and directed him to secure it, which he expressly promised to do. Having failed, however, to regard this warning, a rock fell and injured him. Held, that plaintiff could not recover." *Pioneer Min. & Mfg. Co. v. Thomas*, 32 So. Rep. 15.

out recourse in law.¹ For instance, an injury from a body subject to the law of gravitation, which the employee had himself subjected to such force, would be a risk of the service with which he would be chargeable in law, with knowledge, and he could not recover therefor.²

§ 186. **Same — Knowledge of scientific facts not presumed.** — The courts themselves take judicial notice of scientific information, but in this respect they assume more knowledge than those who occupy the less exalted relation of employees, for the latter, in law, are not chargeable with a knowledge of scientific facts, sufficient to prevent an action for injuries traceable to such causes.³ But where

¹ "All men are taken to understand that fire will burn and water drown." Buswell Per. Inj., Sec. 204, p. 341; Bailey's Mas. Liab. Inj. Serv., p. 152. Risks naturally arising from the work being done are assumed, whether they are visible or invisible, known or unknown. Linton Coal Co. v. Persons, 15 Ind. App. 69; 48 N. E. Rep. 651; Pennsylvania Co. v. Witte, 15 Ind. App. 583; 48 N. E. Rep. 319; Minner v. Sedalia &c. Co., 167 Mo. 99. The danger from a cave-in of a ditch, was held not to be an assumed risk, as matter of law, in Lasalle v. Kostka, 190 Ill. 180; 60 N. E. Rep. 72. An employee in a quarry assumes the risk of the slipping of a bank of earth, caused by the rain, in Illinois. Western Stone Co. v. Muscial, 85 Ill. App. 82. An injury from the falling of a loose piece of rock, cast by a blast, upon the ledge where plaintiff, a quarry laborer, was working, is an assumed risk in New York. DeVitto v. Craig, 165 N. Y. 378; 59 N. E. Rep. 141.

² Watson v. Coal Co., 52 Mo. App. 361; Reiter v. Winona &c. Co. (Minn.), 75 N. W. Rep. 219; Swanson v. Ry. Co., 70 N. W. Rep. 978.

³ McGowan v. La Plata Min. & Smel. Co., 8 McCrary, 393. "Where an inexperienced laborer was ordered to go into a covered pit full of hot ashes and turn water on them, as a result of which he was scalded to death by the steam, the master was guilty of negligence." Hunt v. Desloge Consol. Lead Co. (Mo. App. 1904), 79 S. W. Rep. 710. "Where a servant was employed as a shoveler on the dump of a quartz mill, receiving a shoveler's wages, and was put to work in a dangerous place in the mill, and was required to perform labor on machinery with which he was not familiar, it could not be said as a matter of law that he accepted all the ordinary risks incident to the work, nor that every risk which he could see and guard against was a risk incident to the work."

the nature of the service and the experience of the employee are such as to impress him with a knowledge of danger from causes that one not experienced in the business would fail to observe, then he will be chargeable with sufficient information to prevent a recovery for injuries from conditions that he should have known.¹ Hence, it is, that the important inquiry, in such cases, is to determine the knowledge, or means of knowledge, on the part of the servant, of the danger from a given risk. Where he knew or ought to have known of the danger, he assumes the risk; where he does not, or should not have known of it, he does not.² An employee with little or no experience in such matters should not be chargeable with a knowledge of the effect of water thrown upon hot slag.³ And, again, an employee of experience in chemicals ought to appreciate the danger of an explosion from a given compound;⁴ an experienced miner ought to know the effect of striking dynamite a hard blow, or that fire might explode it,⁵ while one of less experience would not know this fact.⁶

§ 187. **Extraordinary risks not assumed.**—The employee does not agree by his contract of employment to assume any extraordinary risks that may arise in the service of his employer,⁷ and the rule that he assumes all the

Merrifield v. Maryland Gold Quartz Min. Co. (Cal. 1904), 76 Pac. Rep. 710. An employer must keep pace with scientific development and inform himself and his foremen of latent dangers based upon scientific causes, if it be readily obtainable. *Hysell v. Swift & Co.*, 78 Mo. App. 89.

¹ *Buswell*, Per. Inj., Sec. 204, p. 342.

² *Bailey Mas. Liab. Inj. Serv.*, pp. 156, 157.

³ *McGowan v. La Plata Co.*, 3 McCrary, 398.

⁴ *Hill v. Meyer Bros.*, 140 Mo. 438; 41 S. W. Rep. 909.

⁵ *King v. Morgan*, 10 Am. Neg. Rep. 200.

⁶ *Chambers v. Chester*, 172 Mo. 461; 72 S. W. Rep. 904.

⁷ *Tribay v. Brooklyn Min. Co.*, 15 Mor. Min. Rep. 535; *Jones v. Florence Min. Co.*, 28 N. W. Rep. 207. "An employee, whose duty it is to keep up the furnace fire in the air shaft of a mine, does not assume

dangers that are apparent to him at the time of entering into the contract of employment, does not apply to risks that subsequently arise, not within the line of his regular duties, or incidental to his service,¹ or where a knowledge of the danger would be appreciated by those possessing peculiar skill and knowledge in such matters.²

§ 188. **What exceptional risks are assumed.** — The law recognizes a distinction between the employee's knowledge of his actual danger, and his knowledge of the condition which causes the risk, without an appreciation of the resulting danger.³ Where the danger is not apparent to a man of the experience of the injured employee, as where it results from scientific facts not known to ordinary men, and the employer has neglected to inform the employee of such danger and he is ignorant thereof, he does not assume the risk.⁴ Where the employee, however, has

the risk from dynamite being placed near the fire to thaw by employees of the same master in a wholly distinct department of the service, over whom he had no control, who assured him of the absence of all danger." *Angel v. Jellico Coal Min. Co.*, 74 S. W. Rep. 714; 25 Ky. Law Rep. 108. "While a servant assumes the risks ordinarily incident to, and naturally arising out of the employment, he does not assume unusual and extraordinary risks caused by the master's negligence, unless such risks are open and visible, or the servant has knowledge of them." *Garlty v. Bullion-Beck & Champlon Min. Co.* (Utah, 1904), 76 Pac. Rep. 556. "A servant does not assume risks which are unusual or extraordinary to the employment, nor risks of the master's own negligence." *Mallen v. Waldowski*, 101 Ill. App. 367.

¹ *Eddy v. Aurora Min. Co.*, 46 N. W. Rep. 17; *Myhan v. La. Power Co.*, 41 La. Ann. 964; *Burton v. Mo. Pac. Co.*, 32 Mo. App. 455.

² *McGowan v. La Plata M. & S. Co.*, 3 McCrary (U. S.) 398; 10 Mor. Min. Rep. 59; *Smith v. Coal Co.*, 75 Mo. App. 177; *Hunt v. Lead Co.* (Mo. App. 1904), 79 S. W. Rep. 710.

³ *White Mines & Min. Rem.*, Sec. 400, p. 531.

⁴ *Strahlendorf v. Rosenthal*, 30 Wis. 675; *Hysel v. Swift*, 78 Mo. App. 39; *Kelly v. Howell*, 41 Ohio St. 488; *Hester v. Delf Co.*, 84 Mo. App. 457; *Coombs v. New Bedford Co.*, 102 Mass. 573; *McGowan v. La Plata Min. Co.*, 3 McCrary (N. J.), 398; 10 Mor. Min. Rep. 59; *Smith v. Coal*

a knowledge of all the facts in connection with such a danger and the peril is but the natural destructive force, resulting from such state of facts and the condition disclosed, then the employee's knowledge of his danger would be presumed, and for an injury from a risk thus assumed, he could not recover.¹

§ 189. **Selecting more dangerous way to perform duty.**—Where there is more than one method or appliance to use to perform a given duty and an employee selects the more dangerous of the two ways of accomplishing the object sought to be attained, in case of an injury resulting from the method or appliance selected, the employee will be denied a recovery.²

Co., 75 Mo. App. 177; *Thompson v. C., R. I. & Pac. Co.*, 86 Mo. App. 144. An employee performing other duties than those he contracted to perform does not assume the risk, where no warning is given him. *Hillsboro Oil Co. v. White* (Texas), 54 S. W. Rep. 432.

¹ *Lowden v. Idaho Min. Co.*, 55 Cal. 443; *O'Connor v. Adams*, 120 Mass. 427; *King v. Morgen*, 109 Fed. Rep. 126. A servant who, knowing of a danger not within the scope of his assumed risk, nevertheless risks its consequences and is injured, cannot hold the master liable therefor. *Kentucky Freestone Co. v. McGee*, 80 S. W. Rep. 1113; 25 Ky. Law Rep. 2211. But a miner does not assume the dangers of a peculiarly dangerous method of the owner, with which he is not familiar. He has a right to expect the same caution as is customary in such localities. *Bergguist v. Iron Co. (Minn.)*, 52 N. W. Rep. 136. For obeying negligent order of foreman, see *Schlacker v. Ashland Iron Co.*, 89 Mich. 253; 50 N. W. Rep. 889. An employee in Missouri, was held to assume the risk of potassium placed in water, without information of its explosive character, where he ought, in view of all the circumstances, to have known the fact. *Hill v. Meyer Bros. Co.*, 140 Mo. 433; 41 S. W. Rep. 909. An employee of mature years is legally presumed on entering a dangerous employment, to be familiar with the dangers. *Peterson v. New Pittsburgh Coal Co.*, 149 Ind. 260; 49 N. E. Rep. 8; 63 Am. St. Rep. 289. But he does not assume the risk of failure to give him warning of a blast, as he has a right to except such warning. *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253; 39 Atl. Rep. 764; 39 L. R. A. 884.

² *Acme Coal Min. Co. v. McIlair*, 5 Colo. App. 267; *Moore v. K. C., F. S. & M. Co.*, 146 Mo. 572. "An employee who, having a choice between methods of doing the same work, chooses the more dangerous,

Where the employer has prescribed a safer way of doing the particular service which causes the injury, negligence could certainly not be predicated upon any act of his, because an employee did not see fit to utilize the means he had provided, but in voluntarily electing to undertake the service in the more dangerous way, it is only placing upon the employee the burden that he assumed, to subject him to the dangers incident to the more hazardous method or appliance he selected.¹

§ 190. Negligence and incompetency of co-employee. — An employee assumes the risk of injuries resulting from the negligence of his fellow-servants² and likewise such injuries as may result from the unfitness or

assumes the risk involved in that choice." *Palmer v. Kinloch Co.*, 81 Mo. App. 106. A servant who selects the more dangerous of two ways to do his work, assumes the risk of injury therefrom. *Wabash Co. v. Propst*, 92 Ill. App. 485. An employee who uses a cross-cut intended as an air way and not a passage way, for miners, assumes the risk of injury. *Lenk v. Kansas & Texas Coal Co.*, 80 Mo. App. 374. But see *Frank v. Bullion Beck Min. Co.*, 19 Utah, 35; 56 Pac. Rep. 419; 5 Am. Neg. Rep. 733. One who adopts the more hazardous of two ways to do his work, assumes the injury. *Bigelow v. Danielson*, 102 Wis. 470; 78 N. W. Rep. 599. Where there is a comparatively safe and more dangerous way of discharging the duty known to the servant, it is negligence to select the more dangerous method. *Gilbert v. Burlington, C. P. & N. Ry. Co.*, (U. S. C. C. of App., Eighteenth Circuit), 128 Fed. Rep. 529. An employee assumes the risk of doing his work in a way that is dangerous and not customary. *Lepalla v. Cleveland Iron Min. Co. (Mich.)*, 81 N. W. Rep. 553.

¹ An employee, assuming a needlessly dangerous place, cannot recover. So held as to miner going under car to rake out ore, when he could have used a rake. *Morgan v. Hudson River Co.*, 183 N. Y. 666; 81 N. E. Rep. 285. An employee is not guilty of such contributory negligence as to preclude his recovery, merely because he goes down a ladder, with his back to it, where the incline is not over 35 or 40 feet to the 100. *Reese v. Morgan Sil. Min. Co.*, 15 Utah, 453; 49 Pac. Rep. 324.

² *Kivem v. Providence G. & S. M. Co.*, 70 Cal. 392; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Bartonshill Coal Co. v. McGuire*, 3 Macq. 308; *Niantic Coal Min. Co. v. Leonard*, 126 Ill. 216.

incompetency of a fellow-servant, provided he was informed of such incompetency prior to the injury, and continued in the service, without objection or assurance, on the part of his employer.¹ Where the employer has knowingly retained an incompetent employee in his service, however, and an injury results to an employee, who is not informed of such incompetency, as a result thereof, the danger from such incompetency would not be a risk incident to the employee's service,² and if, instead of being a fellow-servant of the injured employee the servant whose negligence caused the injury, possessed power of superintendence or control, injuries resulting from his negligence would not be assumed, but the employer would be liable therefor the same as for negligent acts of his own.³ And where the negligence of

¹ *Kenny v. Shaw*, 133 Mass. 501; *Buswell Per. Inj.*, Sec. 205, p. 345. "Where an employe continued, without complaint, to work in the master's quarry with a fellow-servant, whom he had been acquainted with for several years before the accident, and of whose incompetency he knew, the master, as a matter of law, is not liable for an injury caused by the incompetency of such fellow-servant." *Johnson v. Portland Granite & Stone Co.*, 68 Pac. Rep. 425. "A servant is entitled to assume that the master has exercised due care and diligence in the selection and retention of reasonably competent and careful fellow-servants." *Giordano v. Brandywine Granite Co.*, 52 Atl. Rep. 332.

² *Bailey Mas. Lia. Inj. Serv.*, pp. 58, 59. "The failure to use proper care to employ competent servants is not a risk assumed as part of his service by an employee." *Metropolitan West Side Elevated Co. v. Fortin*, 107 Ill. App. 157. "Risk of injury from negligence of a foreman was an assumed risk, in the absence of negligence by the master in selecting him for such position." *Southern Indiana Co. v. Harrell*, 68 N. E. Rep. 262. And an employer may, by reason of his neglect to find out the incompetency of a servant, be liable, where he has been in his employ a long time. *Kean v. Detroit Copper Mills*, 66 Mich. 284; 33 N. W. Rep. 395. For full discussion of the question of assumed risk, from the negligence of fellow-servants and vice-principals, see chapter *Fellow-Servants in Mines*. Evidence of the knowledge of the pit boss of the incompetency of a miner is sufficient evidence of knowledge of incompetency, on the employer's part. *Cherokee & P. Coal Min. Co. v. Dickinson* (Kan.), 61 Pac. Rep. 450.

³ *Pantzear v. Tilly Iron Min. Co.*, 99 N. Y. 368.

the employer concurs with that of a fellow-servant to cause the injury, the employer would be liable, for it is only where the negligence of a fellow-servant is the approximate and sole cause of the injury that an employee can be held to assume dangers resulting from his negligence. In other words, all that is assumed are risks from the fellow-servant's negligence, and risks from the negligence of a fellow-servant and the master combined are not within the rule.¹

§ 191. **Dangers from latent defects not assumed.**—The implied contract of the employee is only to assume such risks, ordinarily incident to his employment, as are obvious to a person of his skill or experience, or such as could be ascertained by reasonable care on his part.² The most important factor in determining whether or not a given danger was assumed is, therefore, the employee's knowledge or his means of knowledge of such danger.³ Where the danger is primarily due to a latent defect, therefore, which he did not know of, or by the exercise of reasonable care on his part could not have ascertained, the risk is not within his implied contract of employment and is not assumed by him in case of injury therefrom.⁴

¹ Buswell Per. Inj., Sec. 215, p. 371; *Strahlendorf v. Rosenthal*, 80 Wis. 674, a leading case, where the negligence of the master in not disclosing the unsafe condition of a shaft concurred with that of a fellow-servant, in causing the injury.

² *Manly v. Coal Co.*, 55 Iowa, 671; *Williams v. Delaware &c. Co.*, 116 N. Y. 628.

³ *Bailey Mas. Liab. Inj. Serv.*, pp. 156, 157.

⁴ *Davidson v. Cornell*, 31 N. Y. S. R. 982; *Myhan v. La. Power Co.*, 41 La. Ann. 964; *Myers v. Hudson Iron Co.*, 150 Mass. 125; *Buswell Per. Inj.*, Sec. 206, p. 346. An employee is not bound to discover latent defects, but is only bound to inspect for defects that are obvious to the senses. *Yates v. McCullough Iron Co.*, 69 Md. 370; 16 Atl. Rep. 280; *Myers v. Hudson Iron Co.*, 150 Mass. 125; 22 N. E. Rep. 631; *Parke Co. Coal Co. v. Barth*, 5 Ind. App. 159; 31 N. E. Rep. 585.

§ 192. **Dangers from want of repair.** — An employee does not, generally, assume the risk of machinery or appliances becoming dangerous from a want of repair, for this is one of the personal duties of the employer, to keep his appliances in a reasonably safe condition for use, and the duty cannot generally be delegated, to such an extent as to hold the master blameless for a want of repair, for this would be to set aside the rule upon which his duty to repair is predicated.¹ But if the employer furnished a given appliance or machine and it was in a reasonably safe condition, when furnished, and the injured employee was himself charged with the duty of keeping it in repair, he will be held to assume the risk of injury from a want of repair, for his own negligence, in such cases, would be the approximate cause of his injury.²

§ 193. **Promises or assurances of safety.** — Where the presence of a known danger to an employee is taken away from such employee, as an assumed risk, by the assurance of the master, then the knowledge of such danger will not prevent a recovery by the employee, if he remained at work in reliance on the assurance of the employer.³

¹ Buswell Per. Inj., Sec. 193, p. 811; *Niantic Coal Co. v. Leonard*, 126 Ill. 216; *Sanborn v. Madera Flume Co.*, 70 Cal. 261; *Trihay v. Brooklyn Lead Co.*, 4 Utah, 468. "Where an appliance furnished by a master was suitable at the time plaintiff entered his employ, he did not assume the risk of injury from such appliance becoming defective." *Studenroth v. Hammond Co. (Mo.)*, 81 S. W. Rep. 487.

² *Dewey v. Park*, 76 Mich. 631; Buswell Per. Inj., Sec. 193, p. 812.

³ *Faulkner v. Mammoth Co.*, 23 Utah, 437; 66 Pac. Rep. 800; *Carter v. Baldwin*, 81 S. W. Rep. 204. "An instruction which tells the jury that if they find from the evidence that the fellow-servant was incompetent, that plaintiff knew of such incompetency, and notified the top boss of the fact, that the top boss did not remove the incompetent party, but permitted him to continue in the line of his employment after such notice, that plaintiff continued to work with him, and afterwards received the injury complained of by reason of the incompetency of the fellow-

The same result follows from a promise of repair on the part of the master, which would have the effect to lull the employee into a feeling of security.¹ Such conduct on the master's part, either as an assurance or a promise of safety in the future, would be a proper fact for consideration, in determining whether a given danger was or was not assumed.² The employee must have relied upon the assurance or promise of the employer, however, before it will have the effect to prevent the defense of assumed risk, and if he remains in the service after discovery that the

servant, then the plaintiff could not recover in this action, is properly refused, because it omits the essential fact claimed by the plaintiff, that the top boss, when complaint was made of the fellow-servant, ordered plaintiff to go to his work, assuring him that it was all right, and because it makes the entire case turn on the question of the competency of the fellow-servant, whereas one count of the declaration charged defendant with negligence in other respects." *La Salle County Carbon Coal Co. v. Offergeld*, 104 Ill. App. 494. A promise to remedy defective tools takes away the assumption of risk on the part of the employee, in using such tools. *Harvey v. Alturas Gold Min. Co.*, 31 Pac. Rep. 819. "In an action by an employee for injuries received while working at the bottom of a mine shaft by the slipping of a rail from the top of a car on which rails were being conveyed without being fastened to the car, whether the manner of sending the rails down was negligent, when an issue in the case, is a question for the jury, in the absence of evidence indicating negligence on the part of fellow-servants of the injured employee, but showing that defendant's head foreman was present and directing the operation." *Johnson v. Union Pac. Coal Co.*, 76 Pac. Rep. 1089. "Where an employee directed his employer's attention to the fact that the place where he worked was not in proper condition, and telling him he would quit unless it was repaired, and was told to get along the best he could and repairs would be made as soon as possible, such employee did not lose his right to recover by remaining in the employment after such promise to repair." *Westville Coal Co. v. Wood*, 96 Ill. App. 616.

¹ *Morback v. Home Min. Co.*, 53 Kan. 731; 37 Pac. Rep. 132; *Larson v. Min. Co.*, 71 Mo. App. 512; *Heath v. Coal Co.*, 65 Iowa, 737.

² *Buswell Per. Inj.*, Sec. 212, p. 365. But an indefinite promise to repair a known defective appliance, will not render the master liable to one who continues to use it, without knowledge of the defect. *Brewer v. Tenn. Coal &c. Co.*, 97 Tenn. 615; 37 S. W. Rep. 549.

assurance was false or the promise broken, he would subsequently be held to assume the risk.¹

§ 194. Obeying orders of master or vice-principal.— As in the case of a promise to repair or assurance of safety in the use of a known defective appliance, if an employee is injured in obeying an order of the master, or his vice-principal, he will not be denied a recovery, as he has a right to rely upon the superior knowledge or judgment of his superior and does not assume the risk of an injury, while acting upon or obeying such an order.² The reason for the rule depending upon the supposed superior knowledge or experience of the master or his representative, if the reason fails, the rule should likewise fall, and if it should appear that the employee possessed equal or superior knowledge or skill than the one who gave the order, then he would be held to assume the risk.³ But an employee

¹ *Stephenson v. Duncan*, 73 Wis. 404. If an employee fails to use reasonable care to avoid an injury, he is not relieved of the consequences merely because of an assurance or promise of his employer. *Miller v. Bullion Beck Min. Co.*, 18 Utah, 358; 55 Pac. Rep. 58.

² See *Bane v. Irwin* (Mo.), 72 S. W. Rep. 522, where the employer was held liable for sending a miner back upon an unexploded shot. "A mine boss being the representative of the master in the mine in the matter of superintendence, an employee does not assume the risk of his negligence in this respect." *Island Coal Co. v. Swaggerty* (Ind. 1903), 65 N. E. Rep. 1026. "An employee in a quarry, acting in pursuance of the orders of his superintendent, mounted a large rock to drill thereon, and was injured by the stone slipping along the sloping surface of the quarry. He could not have seen under the stone, and though he might have known that there were some chips under it, it did not appear that it was possible for him to see the size and shape and quantity of the chips, so as to determine whether the stone was likely to slip. Held, that there was evidence from which it might be found that he was in the exercise of due care." *Mahoney v. Bay State Pink Granite Co.*, 68 N. E. Rep. 284.

³ *Aldrich v. Furnace Co.*, 78 Mo. 559; *Watson v. Coal Co.*, 5 Mo. App. 366; *Epperson v. Postal Tel. Co.*, 156 Mo. 572. The St. Louis Court of Appeals recently held, however, that an order was a protection from an injury from a falling boulder, where the employee called the foreman's attention to a crevice and knew it was loose. *Carter v. Baldwin*, 81 S. W. Rep. 204.

who engaged in duties outside the scope of his employment, in direct violation of his employer's orders, could not recover for an injury because a vice-principal ordered him to so proceed,¹ nor could he recover for an injury received while obeying one not his superior, who merely assumed to exercise authority as a self-constituted "boss." He would be assuming the risk of obeying assumed authority.²

§ 195. **Where work changes the place.** — The rule which requires the employer to furnish a reasonably safe place for his employees to work, has no application, where the very work of the employee continuously changes the place where the work is being done, such as the work of excavation in a mine or quarry.³ To extend the liability of the employer to such an extent would be to make him responsible for the lack of judgment of his employees or, practically, an insurer of their safety. Where a miner undermines a bank of earth or rock and thereby puts in operation the familiar law of gravitation, he cannot recover for injuries resulting from such a cause.⁴ If the injury is

¹ An employee who engages in outside duties, in violation of his employer's orders, but at request of a vice-principal, assumes the risk of injuries therefrom. *Ind. Nat. Gas. Co. v. Marshall*, 22 Ind. App. 121; 52 N. E. Rep. 232.

² A miner who obeys the orders of one, not his foreman, or superior, assumes the risk of injury therefrom. *Knox v. Coal Co.*, 90 Tenn. 546; 18 S. W. Rep. 255; *Rush v. Coal Bluff Min. Co. (Ind.)*, 30 N. E. Rep. 904.

³ *Relter v. Winona Co.*, 75 N. W. Rep. 219; *Allan v. Logan*, 37 Pac. Rep. 496; *Finlayson v. Utica Min. Co.*, 60 Fed. Rep. 507; *Bradley v. C. & M. Co.*, 138 Mo. 293.

⁴ *Rasmussen v. C. R. I. & P. Co.*, 21 N. W. Rep. 588; *Watson v. Coal Co.*, 52 Mo. App. 366; *Olsen v. McMullen*, 24 N. W. Rep. 318; *Peterson v. Rushford*, 42 N. W. Rep. 1063; *Swanson v. Lafayette*, 33 N. E. Rep. 1033; *Vincennes v. White*, 24 N. E. Rep. 747; *Griffin v. R. R.*, 24 N. E. Rep. 388; *Brown v. Chattanooga Co.*, 47 S. W. Rep. 415; *Mickle v. Rey.*, 79 N. W. Rep. 22; *Bradley v. C. & M. Co.*, 138 Mo. 293.

due to a defective condition of the roof, however, instead of the progress of the employee's work and the natural agencies above mentioned, the employer would not be relieved from liability, if he had knowledge of such condition and, by reasonable care, could have avoided the injury to his employee.¹

§ 196. **Dangers incidental to work assumed.** — The ordinary incidental risks assumed by a miner have been judicially enumerated as, "Such as, arising out of the nature of the work would happen, notwithstanding the exercise of due care and also the risks arising from the acts of the employee's fellow-servants."² This is deemed a fair statement of the rule as to the ordinary incidental risks, assumed by an employee in a mine, by virtue of his contract of employment.³

§ 197. **Duties not incident to service not assumed.** — Exceptional dangers, or risks which are not incident to the service for which an employee was employed, encountered at the request of the employer, are not assumed by the employee.⁴ Where duties outside the line of his service are voluntarily undertaken, however, by an employee, he assumes the dangers attendant upon such voluntary service,⁵ and if the danger is one resulting,

¹ *Larson v. Min. Co.*, 71 Mo. App. 512; *Carter v. Baldwin*, 81 S. W. Rep. 204.

² *Kielly v. Belcher Silver Mine Co.*, 8 Sawyer, 437; 10 Mor. Min. Rep. 82.

³ *White Mines & Min. Rem.*, Sec. 399, p. 580.

⁴ *Smith v. Oxford Iron Co.*, 2 Mor. Min. Rep. 208; *Baxter v. Rober's*, 44 Cal. 187; *Parkhurst v. Johnson*, 50 Mich. 70; 45 Am. Rep. 28; *Kelly v. Wilson*, 21 Ill. App. 141; *Eldridge v. Atlas Co.*, 55 Hun, 309; 28 N. Y. S. R. 51; *Cady v. Aurora Iron Min. Co.*, 46 N. W. Rep. 17.

⁵ *Sweney v. Berlin Co.*, 101 N. Y. 501; *Williams v. Churchill*, 137 Mass. 248; *Rummell v. Dillworth*, 181 Pa. St. 507; *Coal Run Co. v. Jones*, 127 Ill. 379.

primarily, from the negligent manner in which the employee performed the duty, although beyond the scope of his employment, his contributory negligence, would, correspondingly, decrease the responsibility of the employer.¹

§ 198. **Where no work expected at place of injury.** — Before the employer can be chargeable with any negligence in failing to provide a reasonably safe place for his employees to work in, it must appear that the place was one in which he had reason to expect that work would be carried on, for if he had no reason to believe that work would be attempted at the place where an injury occurred, he could not, reasonably, be held guilty of negligence in not doing a useless act, such as providing a safe place, not expected to be put to any use. Accordingly in a recent Iowa case, it is held, that a mine owner need not keep a place in a reasonably safe condition, if he did not contemplate that any work would occur at such place.² And as no negligence could be predicated upon a failure to keep a place safe in the absence of a duty, as to such place, in case of an injury to a miner, at a place where no work was expected to be done, there would be no liability upon the part of the employer, but the employee would be held to assume the risk.³

§ 199. **Employee injured while off duty.** — The duty of the employer, toward his employee, is usually held to continue, only while such employee is engaged in the service of such employer, and employees off duty are regarded

¹ McDonald v. Rock Hill Coal Co., 185 Pa. St. 1; 19 Atl. Rep. 797; Heavey v. Hudson River Water Co., 32 N. Y. S. R. 565.

² The mine owner is not required to keep a place reasonably safe, where he does not expect any work to be done. Taylor v. Star Coal Co. (Iowa), 81 N. W. Rep. 249.

³ Taylor v. Star Coal Co. (Iowa), 81 N. W. Rep. 249.

the same as licensees and assume the risk of injury from any defects in the master's premises or place of work.¹ Where a coal miner, at the noon hour, went to a part of the mine where he had no duty to perform, to visit another miner, he was held to be a mere licensee and assumed the risk of an injury there received, the same as a stranger or licensee would be held to do.²

§ 200. **Injuries from accidents are assumed.** — The implied contract of the employee as to the risks he assumes includes not only those known as obvious dangers, incident to his employment, but all those, as to which he may not have had information, if he had equal means of knowledge with his employer and the danger arose out of the nature of the work, and would have happened, notwithstanding the exercise of proper care.³ Those unforeseen and unexpected events that frequently result so unfortunately to those engaged in hazardous undertakings, such as mining, are none the less disastrous, because they leave the injured employee, or his representatives, without redress.⁴ However, accidents, or those casualties that cannot be traced primarily to the negligence of the employer, are some of the dangers assumed by the

¹ Buswell Per Inj., Secs. 78, 91.

² A coal miner, who, at the noon hour goes to a part of the mine where he has no duty to perform, but to visit with another miner, is out of the line of his duty to such an extent as to assume the risk of injury there received. *Ellsworth v. Metheny*, 104 Fed. Rep. 119; 51 L. R. A. 389. See also *Boemer v. Lead Co.*, 69 Mo. App. 601.

³ *Lanyon Zinc Co. v. Bell* (Kan.), 68 Pac. Rep. 609; *Anderson v. Mikado Min. Co.*, 3 Ont. L. R. 581; *Kielly v. Belcher Co.*, 10 Mor. Min. Rep. 8. For an injury caused by the sliding of earth in a tunnel, where no negligence is shown, and both parties are fully advised of the condition, it was held to be an accident, for which there was no liability. *Shaller v. Corcoran*, 11 O. C. D. 599.

⁴ Buswell Per. Inj., Sec. 111 and note; *Alabama Min. Co. v. Marcus*, 115 Ala. 389; *Diehl v. Iron Co.*, 140 Pa. St. 487; *Bertha Zinc Co. v. Martin*, 98 Va. 791.

miner as a part of his implied contract of employment.¹ The Supreme Court of Missouri has held that an occurrence which an experienced man in that branch of the business could not have foreseen, or guarded against, is a hazard, incident to the business, which every man engaged in it assumes² and this is the general rule.³ But if the injury to an employee results both from causes that are accidental and also from the negligence of the employer, and the casualty would not have taken place, but for the employer's negligence, then the injured employee will not be held to have assumed the risk if he is, himself, without fault and could not in the exercise of due care, have anticipated the danger.⁴

§ 201. **Dangers from unguarded cogs and set screws.** — It is not, *per se*, negligence on the part of the employer, to fail to guard cog-wheels or set screws, or other similar machinery,⁵ and the danger of contact with such machinery, being obvious and threatening, even youthful employees are chargeable with knowledge of such dangers and assume

¹ Bailey Mas. Lia. Inj. Serv., pp. 444, 425.

² Beasley v. Transfer Co., 148 Mo. 413.

³ White Mines v. Min. Rem., Sec. 452, p. 599. For miscellaneous cases of accidents in mines, where employee was held to have assumed the risk, see Ala. Min. Co. v. Marcus, 115 Ala. 819; Dougherty v. Iron Co., 88 Wis. 848; Beeson v. Min. Co., 57 Cal. 205; Mud. Val. Min. Co. v. Parish, 74 Ill. App. 559; Quincy Min. Co. v. Kitts, 42 Mich. 84; Coal Cr. Min. Co. v. Davis, 90 Tenn. 711; Diehl v. Lehigh Iron Co., 140 Pa. St. 487; Moore Lime Co. v. Richardson, 95 Va. 326; Bertha Zinc Co. v. Martin, 93 Va. 791; 20 Am. & Eng. Enc. Law (2 Ed.), 110, 111.

⁴ Bailey Mas. Liab. Inj. Serv., p. 444. If necessary to save the lives of miners, a mine superintendent ought to telegraph for appliances. Bessemer Land Co. v. Campbell, 121 Ala. 50; 25 So. Rep. 798. But a mine owner is not bound to cut a different manway from that in use for taking coal, where it is used for ingress and egress, where an injured employee goes to work. Whatley v. Zenida Coal Co. (Ala.), 26 So. Rep. 125.

⁵ Bailey Mas. Liab. Inj. Serv., p. 153; Schoover v. Car Co., 56 Mich. 182; 22 N. W. Rep. 220; Sullivan v. Mfg. Co., 113 Mass. 396.

the risk of injuries therefrom.¹ No duty of warning generally exists as to such open, obvious dangers, for, as aptly remarked by the Massachusetts court, "The defendant could not have told the plaintiff what he did not know before, if he possessed the ordinary intelligence of boys of fifteen."² But in a Wisconsin case,³ justly criticised by Judge Bailey,⁴ as announcing a false rule, it was held to be negligence to place unguarded cog-wheels so close to a place where an employee was required to work, that the employee, by forgetfulness, might be thrown against them and receive injury.

§ 202. **What injuries from defective hoisting apparatus are assumed.** — In the chapter regarding statutes for safety of miners, the question of how far risks from a failure to comply with the requirements of a statute are assumed, is discussed, and the citations there referred to apply to risks from a failure to construct cages or other

¹ "Where a machinist — an experienced engineer — was directed by his superintendent to block up a stick to keep a belt on a revolving shaft, and the engineer attempted to step over the revolving shaft and was injured by his clothing being caught by a set screw that he did not know was there, but he knew that all shafts had set screws, and he had ample opportunity to ascertain the presence of the one that caused the injury and the danger of the shaft was apparent, and it appeared that he could have gone a safer way or could have stopped the engine, which he controlled, he was guilty of negligence that precluded a recovery." *Kennedy v. Merremack Co.* (Mass. 1904), 16 Amer. Neg. Rep. 89; *Coullard v. Tecumseh Mills*, 151 Mass. 85; 23 N. E. Rep. 731; *Prentiss v. Kent Mfg. Co.*, 63 Mich. 478; 30 N. W. Rep. 109; *Townsend v. Longles*, 41 Fed. Rep. 919. "A servant injured by a revolving screw, held to have assumed the risk, though there was evidence that such screws had been supplanted by a safer device." *Archibald v. Cygolf Co.* (Mass.), 71 N. E. Rep. 315; *O'Keefe v. Thorne* (Pa.), 16 Atl. Rep. 737, a boy of fifteen handling a tin stamping machine.

² *Coullard v. Tecumseh Mills*, 151 Mass. 85; 23 N. E. Rep. 731.

³ *Natan v. Lumber Co.*, 76 Wis. 128; 42 N. W. Rep. 1135.

⁴ Judge Bailey shows that the danger, in this case, was perfectly visible and could be seen at a glance. *Bailey Mas. Liab. Inj. Serv.*, p. 190.

hoisting apparatus, used to raise and lower persons into the mine, the same as to risks from a failure to observe other statutory requirements. Generally, a knowledge by the employee of the failure to comply with the statute, on the part of the employer, is not an assumed risk, for the reason that such a construction would practically repeal such statutes.¹ But Mr. Dresser, in his recent well written work, upon "Employers' Liability,"² takes the position that obvious dangers from the neglect of statutory duties should be assumed, the same as any other risks, and many States hold to this doctrine. It has been held, in Missouri, that assumption of risk is a defense, even as to a violated statutory duty,³ and in Indiana, that a violation of the "cage statute" (Horner's Rev. St. 1897, Sec. 5480m) does not affect the employer's common law defense of assumed risk, since a failure to provide a cage, as the statute required, was obvious to an employee and that in remaining in the service, he assumed the risk.⁴ Irrespective of statute, the danger from a failure to provide a reasonably safe hoisting apparatus may or may not be an assumed

¹ Mt. Olive Coal Co. v. Herbeck, 92 Ill. App. 441; 60 N. E. Rep. 105; Leslie v. Rich Hill Coal Min. Co., 110 Mo. 81. This rule does not apply to the contributory negligence of employee, for the better opinion is that contributory negligence is a defense to an action for violation of statutory duty. See chapter, *Contributory Negligence of Miner*. Burns Rev. St. Ind. 1901, Sec. 7470, requires the mine owner to establish a code of signals for the miners and hoister man. An employee injured as a result of the absence of such signals did not assume the risk, as assumption of risk was held not to be a defense to action for breach of statutory duty. Island Coal Co. v. Swaggerty (Ind. 1903), 13 Amer. Neg. Rep. 267. An employee who has only worked twenty days in a mine will not be charged with knowledge of a defective hoister rope. Perry v. Ricketts, 55 Ill. 234.

² Dresser Emp. Liab., Sec. 51 *et sub*.

³ Spiva v. Osage Coal Min. Co., 88 Mo 68; Adams v. K. & T Coal Co., 85 Mo. App. 486.

⁴ Basell v. Brazil Block Coal Co., 25 Ind. App. 654; 58 N. E. Rep. 856.

risk, according to the knowledge or want of knowledge, on the part of the injured employee. An employee has been held to assume the risk of injury from a protruding bolt in a cage,¹ and an injury due to the sudden hoisting of the cage is likewise an incidental risk which the miner assumes,² as well as the danger of being struck by a tub or cage, in going across or into the "sump" of the shaft.³ But in California, it is held that a miner is not precluded from a recovery for an injury caused by a pin falling from the hoister above him and striking him, merely because the defect in the pin was apparent, as he had the right to presume that, in the proper discharge of his duty, the defect would also be disclosed to the master, or his inspector, and the same repaired or placed in a reasonably safe condition.⁴

§ 203. **Risks obvious to one of employees experience assumed.** — In a recent, well considered New Jersey case, the question was presented to the court, whether or not the expression "ordinary" or "obvious risks," as used in

¹ An employee assumes the risk of injury from a protruding bolt in the cage. *Jayne v. Coal Co.*, 108 Mich. 252; 65 N. W. Rep. 971. An employee does not assume injury from a protruding bolt on the coupling of a revolving shaft, where there is a promise to fix it. *Home Stake Min. Co. v. Fullerton*, 69 Fed. Rep. 928.

² Where an injury received in a cage is due to the sudden hoisting of the cage, instead of the rotten and dangerous condition of the cage, the injured employee assumes the risk. *Roe v. Thomason*, 61 S. W. Rep. 528.

³ An employee going into an open shaft, where tubs are being hoisted, held to assume risk, in Michigan. *Lendberg v. Iron Co.*, 97 Mich. 443; 56 N. W. Rep. 846. See, as to dangers of hoisting apparatus assumed, *Dolan v. Atwater*, 167 Mass. 274; 45 N. E. Rep. 742.

⁴ An employee who had not noticed a loose pin in the hoister above him, does not assume the risk of its falling and striking him. *Higgins v. Williams*, 114 Cal. 176; 45 Pac. Rep. 1041. "In an action for injuries to a miner for alleged defects in hoisting machinery, evidence as to the experience of the mine superintendent, offered by plaintiff for the purpose of accounting for the alleged defects, is properly excluded." *Luman v. Golden Ancient Channel Min. Co.* (Cal. 1903), 74 Pac. Rep. 807.

the trial court's instructions, should have been qualified, as applicable to the peculiar experience or want of experience of the plaintiff.¹ The court held that no such qualification was required, for when the employment presents especially dangerous features, such as would be appreciated by an employee of the skill or experience of the plaintiff, then the employee would also assume the risk of those dangers in entering into or continuing in the service.²

§ 204. **Use of cars and tramways.** — For injuries in the use of cars and tramways around, or in mines, the same principles govern the question of the employee's assumption of such dangers, as apply to other similar appliances. If the employee has knowledge, or by reason of the nature of the defect ought to have, he is held to assume such risks, but otherwise, as to dangers of which he had no knowledge and which were not open to observation by one in his position in the service.³ A "car pusher" in a mine has been held to assume the risk of getting his foot caught under the wheel of the car;⁴ an injury from an incline falling, which was known to be defective, by an employee wheeling ashes over it, is assumed,⁵ and the dan-

¹ *Belleville Stone Co. v. Combes*, 62 N. J. L. 449; 45 Atl. Rep. 1090; affirming 61 N. J. L. 353; 39 Atl. Rep. 641.

² *Belleville Stone Co. v. Combes*, *supra*.

³ *Bailey's Mas. Liab. Inj. Serv.*, pp. 156, 163. An injury from a dirt car flying the track on an incline gravity tramway, is an assumed risk of the employee using the car. *Mattson v. Qualley Const. Co.*, 90 Ill. App. 260; *Forbes v. Coal Co. (Iowa)*, 84 N. W. Rep. 970.

⁴ A car pusher assumes the risk of getting his foot caught under the car wheel. *Kansas & Texas Coal Co. v. Reid*, 85 Fed. Rep. 914.

⁵ "One of the duties of plaintiff, a night watchman of considerable experience, was to wheel ashes up an inclined runway, which needed to be bolstered up by a trig under one corner in order to be made firm. Plaintiff, while performing this duty, was thrown to the floor and injured. In an action for the injuries, when asked whether the trig was in when he started up the plank, he stated that he 'supposed' it was, because he 'generally looked.' " *Held*, that he assumed the risk." *Dally v. Fiberloid Co. (Mass. 1904)*, 71 N. E. Rep. 524.

ger of a car falling from a defective switch, on a tramway, is such an obvious, incidental risk, as to be within the miner's implied contract of assumption of risk.¹ But it has been held in Missouri, that a miner at work in the bottom of the shaft does not assume the risk of a car falling down the shaft, on account of the absence of a block at the top,² and the danger of an injury on account of the track and tramway being too narrow to permit the passage of a car, is not an assumed risk, even on the part of one familiar with such conditions.³

§ 205. **Dangers resulting from breach of statutory duty.** — The courts of the different States have expressed opposite views upon the question of the assumption of risk, from danger due to violations of statutes. Mr. Dresser, in his recent thorough work upon Employers' Liability, takes the position that such risks are assumed, as well as other obvious or known dangers incurred by the employee, under his implied contract of assumption of risk. As a

¹ "Where plaintiff, an operative in an ore concentrating mill, was employed to operate a tram on which buckets of ore were transported from one mill to another by means of switches, which were simple devices operated by hand, and, in performing his duties, plaintiff could not have failed to observe that a certain switch was not supplied with a flange on the inner side, which would have made the connection with the main tram track more secure, but he made no objection to using such switch, and voluntarily continued in defendant's service with knowledge of the defect, if any, he assumed the risk of injury from the falling of a bucket caused by such a defect." *Iowa Gold Min. Co. v. Diefenthaler*, 76 Pac. Rep. 981.

² The risk of a car falling down the shaft is not assumed by an employee working in the mine. *Knight v. Sadtler L. & Z. Co.*, 75 Mo. App. 541.

³ An employee on a tramway would not assume the risk of the track being too narrow to avoid passage of a car, although he had previously used such track. *Benham v. Taylor*, 66 Mo. App. 308. See, also, *Prophet v. Kemper*, 95 Mo. App. 219. But see, *contra*, *Butte v. Pleasant Valley Co.*, 14 Utah, 282; 47 Pac. Rep. 77.

general rule, it is held that all obvious or known dangers are assumed and there can appear to be no reason to except such as result from violations of the statute, from any other known or obvious risks.¹ True, it is suggested that such a construction permits a defense that enables one to benefit by a violation of the law, but this is also true of the same defense where there is a failure to use such care as the law provided should be used, and the fact that the legislative enactment prescribes a given appliance or method, does not make the duty any more imperative than a duty recognized by the courts, in the absence of such legislative declaration, yet the more palpable the breach of duty in this regard, the more obvious and apparent the risk usually becomes, and the more certain the defense. Upon principle, therefore, obvious dangers from violations of statutory duty ought to be held within the implied contract of the employee, the same as other obvious risks, recognized as assumed. The Illinois Supreme Court, however, has held that such a doctrine would virtually nullify the statute,² and the Missouri Supreme Court has expressed a similar view.³ To this it might be replied by the courts, which hold to the opposite view, that any other holding would break down the well-established defense of assumption of risk and deny the employer the benefit of the old common law implied contract, on the part of his employee, long recognized as a part of such contract, before the existence of such statutes. Hence, it is, that the one construction apparently denies the employee the benefit of a statute passed for his protection, while the other denies the employer

¹ Dresser Emp. Liab., Sec. 51 *et sub.*

² Springside Coal Co. v. Patting, 71 N. E. Rep. 371. Assumed risk is not a defense under Illinois statute, regarding the safety of mines. Mt. Olive Coal Co. v. Herbeck, 92 Ill. App. 441; 60 N. E. Rep. 105.

³ Leslie v. Rich Hill Coal Co., 110 Mo. 81.

a well-established defense, based upon a common law implied contract.¹ In *Spiva v. Osage Coal and Mining Company*,² the Supreme Court of Missouri held, however, that the defense of assumption of risk could be maintained as to a duty violated, although it was a statutory duty, and the appellate court of Indiana has also held that the Indiana statute, requiring cages in mines, does not affect the employer's common law defense of assumed risk, and for an injury from a failure to comply with such a statute, since the danger was obvious, the risk was assumed by the injured employee.³

§ 206. When assumption of risk jury question. — When an employee is acquainted with the conditions that threaten him, or from which an injury is liable to result to him in his employment and is also aware of the danger from such conditions, he should be held to assume the risk as a matter of law,⁴ and the same result follows, if the conditions were open to common observation, or the danger was such that he knew as much about it as the employer, or under the circumstances he ought to have equal or

¹ Such conditions suggest some of the imperfections of our system of laws and the impossibilities of reaching absolute and exact justice in all things.

² 88 Mo. 68. In Missouri, there may be such a defense as assumption of risk, or contributory negligence, as to a duty violated, although it is a statutory duty. *Spiva v. Osage Coal & Min. Co.*, 88 Mo. 68. And see *Adams v. K. & T. Coal Co.*, 85 Mo. App. 486.

³ In *Bodell v. Brazil Block Coal Co.* (25 Ind. App. 654; 58 N. E. Rep. 856), it is held that the Indiana statute, relative to cages, covered with boiler iron (*Horner's Rev. St. 1897, Section 5480m*), does not affect the employer's common law defense of assumed risk notwithstanding the violation of the statute. A miner does not assume the danger of the owner not complying with Iowa Code, Sec. 2488, requiring proper ventilation of the mine, as he has a right to assume a compliance with the statute. *Mosgrove v. Zimbleman Coal Co.*, 81 N. W. Rep. 227.

⁴ *Bailey Mas. Liab. Inj. Serv.*, pp. 180, 181.

superior information to his employer.¹ If the evidence of his knowledge is undisputed, or the danger was obvious, the court, as a matter of law, should hold the risk assumed.² Where the servant is not acquainted with the conditions which threaten danger, however, or, if familiar with the conditions, was ignorant of the danger, and has not been informed thereof, by the master, if his lack of experience would lead the master to believe he was ignorant of the danger to which he was liable to be subjected, and the conditions and the danger are not obvious, or such as he ought to observe and appreciate, then the court should submit the question, as an issue of fact to the jury, as to whether or not, under the peculiar circumstances of the case, the employee should be held to have assumed the risk.³ This is a reliable method of ascertaining when the

¹ *Watson v. Coal Co.*, 52 Mo. App. 366; *Aldrich v. Furnace Co.*, 78 Mo. 559.

² *Springside Coal Co. v. Patting* (Ill.), 71 N. E. Rep. 371; *Bailey Mas. Liab. Inj. Serv.*, p. 181.

³ "A coal miner was injured by a fall of rock from the ceiling of an entryway while he was sawing a prop and cap deposited there for his use. The entry was not primarily intended as a working place, but he testified that the reason he prepared the prop and cap there was that there was plenty of height and space, while in the room at the face of the coal where he worked there was no sufficient height. *Held*, that the question of his negligence in working in the entryway was for the jury." *Chicago, W. & V. Coal Co. v. Moran* (Ill. 1904), 71 N. E. Rep. 88; 210 Ill. 9. "Whether a master was negligent in making and promulgating rules for the protection of his servants or in failing to use due care and diligence, after the promulgation of a necessary rule, to have it enforced, is, under the evidence from which reasonable men might differ as to whether the duty has been performed, a question for the jury." *Johnson v. Union Pac. Coal Co.*, 76 Pac. Rep. 1089. "In an action by a miner injured by the falling of a stone from the roof, whether the alleged defectiveness of a pillar cap furnished to support the roof was the proximate cause of the accident *held* a question for the jury." *Cecil v. American Sheet Steel Co.*, 129 Fed. Rep. 542. Common laborer, put to work around dangerous machinery, *held* not as a matter of law to have assumed the risk. *Merrifield v. Maryland Gold Quartz Min. Co.* (Cal.), 76 Pac. Rep.

question of assumed risk is a jury question, and in such case, the court should decide whether or not the given risk was an obvious risk or the employee should have had knowledge of the danger, even if he denies it. The test adopted in Missouri for ascertaining when the question should be submitted to the jury, i. e., if the employee has reasonable grounds to believe he can safely continue at his work, without injury, by exercising due care on his part, then it is for a jury to say if the risk was assumed, otherwise, it is for the court,¹ has made, in practice, the defense of

710. "Some time prior to the accident the timbers in a mine stope in which plaintiff, a miner, was injured by caving, showed evidence that they were bearing an excessive weight and might give way. When that stope was combined with another the result had been to leave an extensive overhanging wall, which pitched at an angle of forty-five degrees, supported only by square sets and by a pillar of decomposed sulphite ore. Such supports were insufficient, and about a week prior to the accident the pressure on the pillar of ore was so great that it had bulged and pushed out of place a number of poles standing at its base, and the hanging wall in the other stopes of the same mine had previously caved in. *Held*, that whether defendant had exercised reasonable care in timbering the stope in which plaintiff was injured was a question for the jury." *Highland Boy Gold Min. Co. v. Pouch*, 124 Fed. Rep. 148. "Where a boulder in a mine had become cracked, and was noticed by servants in the evening, but on the return to work in the morning there was no perceptible change in the crevice, it could not be said as a matter of law, that the danger was so manifest as to threaten immediate injury; and whether or not a servant was guilty of contributory negligence, or of assuming the risk threatened by the crevice in the boulder, was a question of fact for the jury." *Carter v. Baldwin*, 81 S. W. Rep. 204.

¹ *Hammon v. Cent. Coal & Coke Co.*, 156 Mo. 232. Where the evidence is conflicting as to the obvious nature of missed shots, the question is one for jury, as to whether or not the risk was assumed. *Holy Cross Gold Min. Co. v. O'Sullivan (Colo.)*, 60 Pac. Rep. 570. Where the evidence of the injured employee's knowledge of the dangerous roof that injured him, is conflicting, it is proper to submit the question of his assumption of the risk to the jury. *Habishaw v. Standard Quicksilver Co.*, 131 Cal. 430; 63 Pac. Rep. 728; *Hamman v. Central Coal & Coke Co.*, 156 Mo. 232. "The cause of the explosion of dynamite placed near a fire to thaw is a question for the jury, notwithstanding evidence that it would not explode on being subjected to heat; it having exploded either from

assumed risk, always a jury question, as few employees, much less their counsel, but have learned such an easy way to reach a jury with their case, and it is now universally recognized in such cases, and should be taken judicial knowledge of, by the courts, that all plaintiffs, in every character of personal injury action, had concluded before his injury, "that by exercising due care, on his part, he could continue the performance of his duties without injury."¹ And thus by the recognition of such a doctrine litigants are practically denied the benefit of this defense in Missouri and other States where such a flexible rule obtains.

the action of the heat, or from concussion by something striking or falling on it unknown to those present at the time, and it being hard to understand how it could have occurred, if not from the action of the heat." *Angel v. Jellico Coal Min. Co.*, 74 S. W. Rep. 714; 25 Ky. Law Rep. 108.

¹ This has become a hackneyed phrase, in damage suits, in Missouri. In urging the argument that such ordinary dangers, as are incidental to known defects or conditions, should be held assumed, as a matter of law, although the plaintiff deny knowledge thereof, Judge Bailey says: "Where there are no peculiar dangers, knowledge of the defect is knowledge of the danger; as to such defect the servant cannot be heard to say that while they were apparent and obvious, yet he did not know or ascertain their precise location, or realize their apparent danger; knowing them to exist, it is his duty to ascertain their precise location, with reference to the performance of his duties; how then, can it be said, that the jury are to determine whether or not he had knowledge." *Bailey Mas. Liab. Inj. Serv.*, p. 181. "In an action against a master for injuries to a servant caused by a splinter of steel flying from a steel rod which he was holding while other servants hammered the end so as to swell it, evidence that the servant had worked continuously for 48 hours without any sleep, and that at the end of 86 hours he had stated that he did not think he could endure the strain, was competent, as bearing on the question whether he was in a condition to apprehend and appreciate the danger to which he was subjected." *Republic Iron & Steel Co. v. Ohler*, 68 N. E. Rep. 901.

CHAPTER X.

VARIOUS INCIDENTS OF RISKS ASSUMED.

SECTION 207. Scope of chapter.

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§ 207. Scope of chapter. — Having discussed, in the previous chapter, the principles underlying the doctrine of assumed risks, in mines, which is not essentially different from those underlying principles, applicable to other hazardous branches of business, it is the object of the present chapter to give illustrations of specific risks in mines, held by the courts to come within the rule of

assumed risks of the employee, in order that the practitioner, defending actions for injuries in mines, may have before him a list of well-considered cases of various risks in mines, held to be assumed.

§ 208. **Death of experienced miner by falling slate.** — Decedent, a miner of experience, was killed by the falling of a ledge of slate. He was assigned to that particular part of the mine at the demand of a committee of miners and was familiar with the conditions under which he worked. The ledge of slate was examined in the decedent's presence, by his helper, who was an experienced miner, and it was deemed safe; the decedent being present and hearing the tests made and knowing the result thereof. It was not deemed necessary to prop the ledge and no props were called for and it was held that the decedent assumed the risk of injury from the falling of the ledge and that no recovery could be had for his death.¹

§ 209. **Fellow-servant's act in removing rope.** — Where a miner was directed down an inclined chute, for the purpose of putting in lagging and he requested that a rope be furnished him to prevent his falling, and at the direction of the manager of the mine, the miner himself placed a rope in the chute, which was later removed by a fellow-servant, and the miner continued at his work, with full knowledge that it had been removed, and was later injured by falling, he was held to assume the risk and was not entitled to recover therefor.²

§ 210. **Injury from falling iron, being hoisted.** — A servant was injured by the falling of an iron hanger, being

¹ *Dickenson Coal Co. v. Unverferth*, 30 Ind. App. 546; 66 N. E. Rep. 759.

² *Bunker Hill Mining & Concentrating Co. v. Kettleon*, 121 Fed. Rep. 529; 58 C. C. A. 525.

hoisted, by means of a rope above where the plaintiff stood. The plaintiff knew that the place was not safe and that there was danger of the hanger coming out of the rope and falling, if it was not tied securely, or was apt to catch, on being hoisted. It was held that he assumed the risk of the falling of the iron, on account of being insecurely fastened, or on striking on some object, in its ascent, and being loosened thereby, and could not recover for a resulting injury therefrom.¹

§ 211. **Injury from falling between coal cars, in mine.** One employed to stand at the air-tight doors in a coal mine and to open and close them for a train going in and out, whose duty it is to provide himself with matches, oil and a lamp, but who fails to provide himself with matches and steps upon the rear end of a car to get matches from the driver and while passing along the tops of the cars, falls between them and is injured, assumes the risk, in Kentucky.²

§ 212. **Drillman, in mine or quarry, assumes risk of explosion.** — A “drillman” in a quarry, who, in conjunction with a “loader,” attempted to load a drill hole and was injured by a premature explosion, the “loader” not being the foreman of the work, or a vice-principal, but

¹ Cathron v. Cudahy Co., 98 Mo. App. 343; 73 S. W. Rep. 279. “Plaintiff was injured by the falling of a conveyor in a plant, caused by its being permitted to run off an open switch. Plaintiff had been injured in the same manner before, and knew that, unless the switch was closed, the conveyor would fall. When the conveyor approached the place where the switch was, which was insufficiently lighted, plaintiff attempted to ascertain whether it was closed by feeling with a stick, and proceeded to carry the conveyor over the switch without ascertaining positively that it was closed. *Held*, that plaintiff assumed the risk of such injury and was therefore not entitled to recover.” Beymer v. Hammond Co., 80 S. W. Rep. 685.

² Hollingsworth v. Pineville Coal Co., 74 S. W. Rep. 205.

a fellow-servant with the plaintiff, is held to assume the risk, in Michigan.¹ And a similar rule is announced in a late case, in Missouri, where the " helper " of a drillman was engaged, with the latter, in drilling holes in the employer's mine and they drilled into an unexploded charge of dynamite and both were held to be fellow-servants and to assume the risk of injury from such a cause.²

§ 213. **Danger of shaft caving in assumed by experienced miner.**— An experienced miner who voluntarily prosecutes the work of sinking a shaft, assumes the risk of a cave-in, while timbering the shaft, where he knows more of the shaft and the character of the ground than his employer.³ But if the shaft has a crevice in it which renders it a dangerous place to work in and the employer is familiar with the defect, but the employee is not, then the latter would be entitled to a warning of this danger and for an injury where no warning is given, the employer would be liable,⁴ although the employee would assume the risk if he had knowledge of the defects which made the place dangerous.⁵

§ 214. **Boiler inspector assumes danger of hot ashes.**— A boiler inspector who represented that he possessed the

¹ *Kopf v. Monroe Stone Co.*, 95 N. W. Rep. 72. See, also, *Whaley v. Coleman*, 88 S. W. Rep. 119.

² *Livengood v. Joplin Mining and Smelting Co.*, 179 Mo. 229; 77 S. W. Rep. 1077.

³ *Stiles v. Ritchie*, 8 Colo. App. 393; 46 Pac. Rep. 694; *Henson v. Armour Co.*, 88 S. W. Rep. 166; *Wojtylak v. K. & T. Coal Co.*, 87 S. W. Rep. 506.

⁴ *Strahlendorf v. Rosenthal (Wis.)*, 10 Mor. Min. Rep. 676. An employer is not negligent in failing to warn an employee of a danger of which the employee already knows. *Nye v. Dutton (Mass.)*, 78 N. E. Rep. 654.

⁵ *Consolidated Coal Co. v. Scheeler*, 42 Ill. App. 619; *Aldrich v. Furnace Co.*, 78 Mo. 559.

requisite experience to perform all work in connection with the inspection of boilers, where he saw and appreciated the conditions which surrounded him, cannot recover for an injury sustained by falling into the combustion chamber of the boiler, as a result of which he was burned by hot ashes and burning soot.¹ The employer would naturally expect one who represented himself of sufficient experience to perform the ordinary duties of the service for which he was engaged, would be familiar with the dangers ordinarily incident to the service and there would be no duty implied on his part to warn such an employee of the dangers of the service.

§ 215. **Danger of protruding bolts and setscrews, generally assumed.** — The risk of injury from a protruding set screw or bolt is so plainly obvious that an employee is held to assume such risk, as a matter of law, in most jurisdictions, under the familiar rule that obvious risks from dangers that are apparent are assumed by all employees, regardless of age or experience.²

§ 216. **Premature explosions from dynamite.** — In most of the best considered cases, the risk of injury from premature explosions of dynamite, whether the explosion occurs in the loading of a drill hole, or in the subsequent explosion of a missed shot, is held to be a risk assumed by the employee, familiar with the use of dynamite.³

¹ *Westville Coal Co. v. Milka*, 75 Ill. App. 688.

² *Demers v. Marshall*, 172 Mass. 548; 52 N. E. Rep. 1066. For assumption of risk from protruding bolt, see *Detroit Oil Co. v. Grable*, 94 Fed. Rep. 78.

³ In *King v. Morgen* (109 Fed. Rep. 466; 10 Amer. Neg. Rep. 200), the plaintiff, a young man of two years' experience, was injured by an explosion in loading a drill hole, with an iron tamping bar. In *Livengood v. Joplin M. & S. Co.* (179 Mo. 229; 77 S. W. Rep. 1077), the plaintiff, the helper of a drillman, was injured by drilling into an unexploded shot.

§ 217. Violation of master's instructions. — Where a servant chooses to do the work, which he has contracted to perform under his contract of service, in a manner that he has been instructed not to do it in, by the master, he assumes the risk of injury received, in the performance of such work and cannot hold the master responsible, since

These cases seem to be in accord with the general rule which is announced wherever the question has been passed upon by the courts of the different States. In *Browne v. King* (100 Fed. Rep. 561), a steam drill man and his "helper" were held to be fellow-servants, and each was held to assume the risk of injury from the negligent acts of the other, in their work of loading and unloading drill holes. An employee in a stone quarry, in Michigan, attempting to push dynamite into a drill hole, where a premature explosion occurred, was held to be guilty of such contributory negligence as precluded a recovery. *Kopf v. Stone Co.*, 95 N. W. Rep. 72. A similar rule was announced, in Massachusetts, as to an experienced quarry employee, holding a drill, for the superintendent to drill out tamping from an unexploded drill hole. *Allard v. Hildreth* (Mass.), 5 Amer. Neg. Rep. 610. A like doctrine was laid down in Wisconsin, in the recent case of *Wiskie v. Montello Granite Co.*, 10 Amer. Neg. Rep. 684. In Iowa, an employee in a quarry, who used a steel bar to drill out a drill hole and struck an unexploded charge of dynamite, which occasioned an explosion and resulting injury, was held to have assumed the risk. *Lanza v. LeGrand Quarry Co.* (1902), 11 Amer. Neg. Rep. 209. An injury from an exploded blast, in a quarry where the manner of loading the drill hole was left to the employee's discretion, was held to give no cause of action in New Hampshire, in *Hendlesay v. Williams*, 23 Atl. Rep. 865. And in the following similar accidents, from explosions of dynamite in drill holes, the master was held not liable, viz.: *Dunn v. McNamee* (N. J.), 2 Amer. Neg. Rep. 84; *Welch v. Grace* (Mass.), 1 Amer. Neg. Rep. 614; *Vitto v. Farley* (N. Y.), 2 Amer. Neg. Rep. 47; *Cullen v. Norton*, 126 N. Y. 1; *Anderson v. Daly Mining Co.* (Utah), 4 Amer. Neg. Rep. 86; *Mast v. Kern* (Oregon), 5 Amer. Neg. Rep. 88. "Where in a mine it was customary to push giant powder into holes in the rock by means of pieces of gas pipe with wooden plugs driven in the end, and a miner, finding that the pieces of gas pipe were in use by others temporarily, placed a stick of powder by means of a shank of a steel drill belonging to himself, and was injured by an explosion from a spark resulting from the contact between the steel drill and the flinty rock, he could not recover, because of his contributory negligence." *Whaley v. Coleman et al.* (Kansas City Court of Appeals, Missouri, June 5, 1905), 88 S. W. Rep. 119.

his voluntary selection of the mode of doing the work, if dangerous, would be the same as an election to perform it in the more dangerous of two ways to do it and the cases are numerous that in such case he could not recover.¹

§ 218. **Lifting heavy objects.** —An employee who voluntarily attempts to lift a heavy object and sustains injury thereby is held to assume the risk of such injury, unless it can be said that he is an inexperienced servant and the master has given a negligent direction, or assurance of safety.² This conclusion could only follow, as a result of the application of the doctrine of assumed risk, for an employer is never presumed to exercise a greater degree of diligence to protect an employee than he will exercise to protect himself, and to hold the master liable for an injury to

¹ "Where a servant chooses to do the work, which it is his duty to do, by a method known to him to be dangerous, contrary to the directions of the master, the master is not liable for an injury caused thereby, whether the danger be obvious or not." *Whitson v. Wrenn* (N. C. 1908), 46 S. E. Rep. 17. "Part of the passageway constituting the second floor of defendant's engine room had been removed to make room for machinery. The open space thus made was partly spanned by a plank. A laborer attempting to cross over the plank was injured by its slipping and precipitating him to the floor below. *Held*, that defendant was not liable for having failed to furnish a safe passageway, as the laborer might have gone around the gallery the other way, had he chosen to do so." *McKane v. Colorado Fuel & Iron Co.*, 71 Pac. Rep. 425. The selection of the more dangerous of two ways to do a given piece of work, is held to preclude a recovery, in the following late cases: *Gilbert v. Burlington Co.*, 128 Fed. Rep. 529; 63 C. C. A. 27; *Schoultz v. Eckhard Co.*, 112 La. 568; 36 So. Rep. 596; *Newport Co. v. Baumeister*, 102 Va. 677; 47 S. E. Rep. 821; *Moore v. R. R.*, 146 Mo. 572. In *Gribben v. Yellow Aster Mining Co.* (142 Cal. 248), the plaintiff was injured by the breaking of a holster rope, as he was being let down into the mine. It was shown that there was a ladder that he could have used, which was a safer means of entry into the shaft, and the court held, by the selection of the more dangerous way to go down, he assumed the risk. 75 Pac. Rep. 839.

² *Leitner v. Grieb* (Mo. App. 1908), 77 S. W. Rep. 764.

one who prefers to hold on to a heavy object, until he injures himself, rather than let go, by analogy would render him liable for the injury, if his employee would sit so close to a fire that he would burn his knees, rather than move back.¹

§ 219. **Dangers usually incident to employment.** — By a great many courts — and some few lawyers — the distinction is frequently lost sight of between risks that are incident to the employment, although not threatening immediate and obvious injury, and those that are obvious and threatening.² In the States where the common law doctrine of assumed risk obtains, a risk is assumed, if incident to the business, as usually conducted, although it may not threaten immediate injury,³ but dangers from open, obvious defects are always assumed, whether incident to the business, as usually carried on, or not.⁴

¹ Where an employer directed two employees to move a heavy stone, and, on their suggestion that they should have a third man to assist them, told them to move it or quit the job, whereupon they undertook the task, and one of them was injured, the fact that the injured servant was but 17 years old would not change the rule of assumption of risk; it appearing that he had some experience at the same kind of labor, and there being nothing to show that he was not fully aware of the character of the undertaking. *Leitner v. Grieb* (Mo. App. 1903), 77 S. W. Rep. 764.

² The Supreme Court of Missouri in a recent well written opinion noted the above distinction and reversed the case because the trial court did not. *Minnier v. Sedalia &c. Co.*, 167 Mo. 94.

³ Where a person voluntarily enters the service of another, he assumes all the risks usually incident to such employment, and is presumed to have contracted with respect thereto." *Big Stone Gap Iron Co. v. Ketron* (Va. 1903), 45 S. E. Rep. 740.

⁴ "Where a servant enters the employment of a master, he assumes all the ordinary risks, whether the employment be dangerous or otherwise." *Richards v. Riverside Iron Works* (W. Va. 1904), 49 S. E. Rep. 437. "A servant assumes the risk incident to his employment, including such as arise from the negligence of a fellow-servant engaged in the common employment." *McDonald v. Standard Oil Co.* (N. J. 1903), 55

§ 220. **Using known defective appliance without complaint.** — Where an employee discovers a defect in an instrument or appliance, or it has an obvious defect or flaw, he assumes the risk of injury therefrom, by a continued use thereof, without complaint.¹ And the rule is the same if he has the selection of material with which to make an appliance, or he selects, from a number, an appliance that is not safe.² And the courts, as a matter of law, should declare such risks to be assumed and not leave the question to the uncertain finding of a jury.³

§ 221. **Injury from action of elements — Wind.** — If the familiar action of such natural elements as wind, fire and water were not chargeable to an employee then he would indeed be a favorite object of the court's tutelage and the master would be an insurer against the action of nature's fixed laws. But the courts do not recognize the right of one to run counter to natural laws, or the elements, and hold another for such recklessness, and hence it is, that

Atl. Rep. 289. "A master is not liable for an injury to a servant caused by the breaking of a defective hinge connecting two parts of a ladder; for the defect, if obvious, could have been seen by the servant, and, if not obvious, could not have been determined by an inspection by the master." *Hengler v. Cohn* (N. J. Sup. 1902), 53 Atl. Rep. 280.

¹ "Where no complaint has been made by the servant of the defects, and he is aware thereof, if he continue in the employment, he assumes the risk; and the question cannot be submitted to a jury to decide whether a man of ordinary prudence and caution would have so continued." *Harte v. Fraser*, 104 Ill. App. 201.

² "Where a servant assumes the selection of materials to be used by him in doing a job of work, he must examine them and exercise his best judgment in selecting such only as are fit for the purpose." *Lee v. Kansas City Gas Co.*, 91 Mo. App. 612.

³ *Harte v. Fraser*, 104 Ill. App. 201. "Where a servant left his machine to seek one of his employers, in order to have a cause of danger to him removed, but, not finding the one sought, returned to the machine, and was injured, he could not recover; the risk having been assumed." *Dobbins v. Lang* (Mass. 1902), 63 N. E. Rep. 911.

injuries received from the action of the wind, or water, unless due to the master's negligence, are assumed by the employee.¹

§ 222. Obeying employee without power of control.— Since an employee is held to assume the risk of injury from negligence of his fellow-servants, it is immaterial whether the act of negligence is one of commission or omission, or takes the form of a negligent order, obeyed by the injured employee, the master is not responsible for an injury due to the negligent act of a fellow-servant.² The mere assumption by an employee of a power to control his fellows, without a delegation of such power, by the employer, will never render the employer liable for the orders of such subordinate and if an employee sees fit, volun-

¹ "Where plaintiff, a person of ordinary intelligence, was employed as a general helper in excavating cellars, etc., and his duty was to do whatever work he was directed by his employers to do, he assumed the risk of injury by the swinging of a derrick boom, which he was working while a high wind was blowing; the natural effect of the wind being open and obvious." *Frangiose v. Horton & Hemenway* (R. I. 1904), 58 Atl. Rep. 949; 26 R. I. 291.

² "Two forces of men, employed by defendant in digging two trenches towards each other, had reached a point where a wall of rock only two feet thick separated them, when a blast was set off, without sufficient warning, in one of the trenches, tearing down the rock wall and injuring plaintiff, who was employed in the other trench. *Held*, that defendant was not liable, as having failed to provide a safe place for plaintiff to work, but that the injury was due to the negligence of plaintiff's fellow-servants, the risk of which he assumed in engaging in the work, whether such negligence was that of the foreman in charge or of some other workman." *Ward v. Naughton* (N. Y. Sup. 1902), 77 N. Y. S. 844. "Plaintiff was engaged in loading stone in a dump car, with two other servants assisting. One of such servants, under the other's direction, had placed a stone beside the track in such a manner that it fell on plaintiff while he was pushing the car. *Held*, that the injury resulted from an ordinary risk of plaintiff's service, and was assumed by him." *Smallwood v. Bedford Quarries Co.* (Ind. App. 1902), 63 N. E. Rep. 869.

tarily, to recognize such self-constituted authority, he assumes the risk of obedience, or should look to such employee for redress.¹

§ 223. **Dangerous position — On top of coal cars.**— An employee who voluntarily assumes a known dangerous position, when he need not have done so, in the performance of his duties for the master, but temporarily deviates from his customary course upon an inclination of his own, assumes the risks of injury while maintaining such a dangerous position. This rule is illustrated by a recent case in Kentucky, where an employee, whose duties required that he assume a position at the shaft, sought to ride the cars as they passed through the mine and to pass over them and while so doing he fell and was injured. The court very properly held that no recovery could be had therefor.²

§ 224. **Injury that experienced man could not foresee.** — Whenever an employee is injured by an act which an experienced man in the business could not have antici-

¹ "A servant employed in a stone quarry as a 'driller,' under the direction of the 'loader' attempted to load a hole with dynamite, and was injured by an explosion. The loader was not the foreman of the work, or one whose directions the servant was bound to obey. *Held*, that the servant assumed the risk." *Kopf v. Monroe Stone Co.* (Mich. 1903), 95 N. W. Rep. 72; 10 Detroit Leg. N. 185.

² "One employed to stand at the air-tight doors across a shaft of a coal mine, and to open them for and close them after a train going in or out, and whose duty it is to keep himself supplied with lamp oil and matches, cannot recover of his employer, where his lamp is blown out as he opens the doors, and, having neglected to supply himself with matches, he climbs on the rear of an outgoing train to get a match from the driver, and while passing along the tops of the cars, falls between them." *Hollingsworth v. Pineville Coal Co.* (Ky. 1903), 74 S. W. Rep. 205; 24 Ky. Law Rep. 2437.

pated would occur, there can be no recovery,¹ for an employer is only answerable for a failure to use ordinary care. He is not required to exercise extraordinary foresight, but only that of a reasonably careful man to avoid injury to his employees and if the cause of an injury was not likely to have been foreseen by a man of ordinary skill in the business there is held to be such an absence of negligence on the part of the employer, as will relieve him from liability.²

§ 225. **Danger from ore fumes assumed.**—The general rule that an employee assumes all the risks ordinarily incident to the business and those arising from patent and obvious defects, has been applied with reference to mine owner and miner, in a recent case, where it was held that a miner, ordinarily skilled in the business, assumed the risk of injury, consequent upon entering a room filled with the noxious fumes from iron pyrites.³ In such case, however, the knowledge of the exact condition, by the injured employee, and his appreciation of the danger, would be material in determining whether or not the risk was assumed,⁴ for a knowledge, or appreciation of

¹ *Beasley v. Transfer Co.*, 148 Mo. 413.

² "Where an accident results from an unforeseen cause, not discoverable in advance of its occurrence, with no visible defect in any part of the machine, and no knowledge of any defect on the part of the men who were constantly using the machinery, or of the employer, the accident is one of the ordinary risks of the employment, which the servant takes on himself." *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464. "The servant assumed also, the risk of the falling of a metal bar which was placed in a rack wherein there was not sufficient room for it, where there was no evidence as to what made the car fall, and the only evidence of negligence was that half of the bar stood out beyond the ends of the pegs constituting the rack." *Langley v. Wheelock* (Mass. 1902), 63 N. E. Rep. 944.

³ *Williams v. Walton & Co.*, 9 Houst. 322; 32 Atl. Rep. 726.

⁴ *Williams v. Walton Co.*, 9 Houst. 322; 32 Atl. Rep. 726.

the danger, is always important in determining such questions.¹

§ 226. **Slippery condition of floor or ladder assumed.**—With the obvious risks, held to be assumed by an employee, are dangers from a greasy or slippery condition of a floor around where machinery is oiled,² or mineral is washed or prepared for market.³ This would especially be true, where such condition ordinarily prevailed, or where it arose from and was incidental to the work the servant was engaged to perform.⁴ A coal miner has also been held, as a matter of law, to assume the risk of injury from a slippery condition of a ladder, at the bottom of the mine, for the nature of the danger is such that it was open to common observation and was one about which the employee knew as much as the employer.⁵

§ 227. **When danger from fire damp or gas is assumed.**—In those States where it is held that danger from a breach of statutory duty is never a risk assumed by an employee, an injury from an explosion of fire damp or gas, due to a breach of statutory duty, would not be assumed by a miner,⁶ but in some jurisdictions, even where such statutes are in force, such dangers are held, under certain circumstances, to be risks assumed by the miner. In West Virginia, an injury from an explosion of fire damp was held to be an assumed risk,⁷ and this is generally true where the accumulation of vapor takes place so

¹ *Ballley Mas. Liab. Inj. Serv.* 156, 182.

² *Murphy v. Amer. &c. Co.*, 159 Mass. 256; 31 N. E. Rep. 268.

³ *Schorenbraich v. St. Cloud Fiber &c. Co.*, 59 Minn. 116; 60 N. W. Rep. 1093.

⁴ *Murphy v. Amer &c., Co.*, 159 Mass. 256; 31 N. E. Rep. 268.

⁵ *O'Neill v. Wilson*, 20 Sc. Sess. Cas. 2 Ser. 427.

⁶ See chapter, *Statutes Regarding Safety of Miners*.

⁷ *Berns v. Gaston Gas Coal Co.*, 2 W. Va. 285; 55 Am. Rep. 304.

quickly that the mine owner could not have prevented the injury, as where an explosion results after a period of only fifteen minutes' accumulation of gas.¹

§ 228. **Unfitness of tool, from use.**—Where an employee has charge of his tools or implements of service, he is bound to see that they are kept in a reasonably safe condition for use and if he knowingly fails to keep his tools in repair and is injured from a defect, due to the proper use of the appliance, he is held to have assumed the risk.² This rule extends to all the relations of master and servant and is based upon the obligation, on the servant's part, to use the same precaution, for his own safety, that he would expect his employer to use for him. And a failure to repair his tool or appliance, when the duty devolved upon him, would also bring him within the rule of assumed risk, extending to cases where an employee knowingly selects the more dangerous of two ways to do his work.³

§ 229. **Injury from sliding earth bank assumed.**—An injury from the falling or sliding of earth or rock, due to natural laws, or conditions superinduced by the injured employee, or his fellow-servants, is a risk assumed by a miner. In an Illinois case, after a heavy rain, an earth bank was examined by the plaintiff and his foreman and both pronounced it safe, but he was subsequently injured by the subsidence of the bank and was held to assume the risk.⁴ If he had remained at work, however, on account of the assurance of his foreman, although the condition was obvious, under a recent Missouri case, he could recover in case of injury.⁵

¹ *Sommers v. Carbon Hill Coal Co.*, 91 Fed. Rep. 387.

² *St. Louis Bolt & Iron Co. v. Brennan*, 20 Ill. App. 555; *Stroble v. Ry. Co.*, 70 Iowa, 558; 81 N. W. Rep. 68.

³ *Master's Liab. Inj. Serv.* 169.

⁴ *Western Stone Co. v. Muscial*, 85 Ill. App. 82.

⁵ *Carter v. Baldwin*, 81 S. W. Rep. 204.

§ 230. **Dangers from striking or chipping of hammer assumed.**— An employee engaged in driving a drill, or other appliances with a hammer, assumes the risk of injury from the hammer falling and striking him,¹ as such an occurrence could not have been foreseen, or anticipated by one ordinarily skilled in the business, and where the chipping of a hammer is not due to a latent, dangerous condition of the metal, but is the result of the continued use of the hammer, an injury from the chipping of the hammer, will be assumed by an employee, as a risk incident to the work of handling such hammer.²

§ 231. **Injury to minor servant from uncovered cog-wheels.** — Where a minor servant, from the circumstances and length of his employment, ought to have known and comprehended the danger from certain uncovered cog-wheels, while attempting to work a valve on an engine he was employed to fire, he was held, in Wisconsin, to assume the risk of injury therefrom.³

§ 232. **Various incidents of risks assumed by infants.**— The courts uniformly holding that when an infant is possessed of sufficient capacity and intelligence to understand not only the defect of the appliance or place of work, but also the danger to himself from injury therefrom, the cases which have been passed upon by the courts, wherein minors are held to have assumed the risk of injury, are as numerous and diversified as the employment of infants in the various relations of life. The following dangers incident to the business of mining have been held to be assumed, by those injured, although under the age to make

¹ *McPhee v. Scully*, 168 Mass. 216; 89 N. E. Rep. 1007.

² *Hopkins Co. v. Burnett*, 85 Texas, 15; 19 S. W. Rep. 886.

³ *Uptegrove v. Jones & Adams Coal Co.*, 96 N. W. Rep. 885.

a valid contract, viz., the absence of a light;¹ the wet, slippery, or uneven condition of a floor;² the liability of a trench to cave-in;³ the liability of an undermined bank of earth or gravel to fall;⁴ the danger from unguarded openings and pits;⁵ unguarded platforms and scaffolds;⁶ falling earth, rock or missiles, in mines,⁷ premature explosions of missed shots and drill holes in mines;⁸ gas explosions;⁹ explosions of hotslag, molten iron and such substances;¹⁰ obvious defects in material and appliances of work;¹¹ methods of work;¹² dangers from defective machinery;¹³ dangers in place of work, when obvious or appreciated;¹⁴ and an insufficient force of men to properly accomplish the

¹ *Kaare v. Troy Steel & Wire Co.*, 139 N. Y. 369.

² *Hathaway v. Atlanta Steel Co.*, 155 Ind. 507; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282.

³ *Hughes v. Malden & Melrose Co.*, 168 Mass. 395; *Vincennes Water Co. v. White*, 124 Ind. 376; *Ft. Wayne v. Christie*, 156 Ind. 172.

⁴ *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71; *Swanson v. Lafayette*, 134 Ind. 625; *O'Driscoll v. Faxon*, 156 Mass. 527; *Aldrich v. Furnace Co.*, 78 Mo. 559; *Bradley v. C. & M. Co.*, 138 Mo. 294.

⁵ *Hoard v. Blackstone Co.*, 177 Mass. 69; *Fulger v. Booth*, 117 Mo. 475.

⁶ *O'Maley v. So. Boston Gas Co.* 158 Mass. 135.

⁷ *Linton Coal & Min. Co. v. Persons*, 11 Ind. App. 264; *Harder v. Haffner Coal Co.*, 104 Fed. Rep. 282; *Stiles v. Ritchie*, 8 Colo. App. 393.

⁸ *Holy Cross Gold Mine Co. v. O'Sullivan*, 27 Colo. 237; *Eureka Block Coal Co. v. Wells* (Ind. App.), 61 N. E. Rep. 236; *Livengood v. Joplin Mining & Smelting Co.*, 179 Mo. 229; *King v. Morgen*, 100 Fed. Rep. 205.

⁹ *Fuller v. N. Y. & N. H. Co.*, 175 Mass. 424.

¹⁰ *McGowan v. LaPlata M. & S. Co.*, 9 Fed. Rep. 861; *Gowen v. Bush*, 76 Fed. Rep. 349; *Lyons v. Boston &c. Co.*, 168 Mass. 168.

¹¹ *Consolidated Stone Co. v. Summitt*, 152 Ind. 297.

¹² *Labelle v. Montague*, 174 Mass. 453; *Wilson v. Tremont Mills*, 159 Mass. 154.

¹³ *Anderson v. Clark*, 155 Mass. 368; *Salem Stone and Lime Co. v. Tepps*, 10 Ind. App. 516; *Dolan v. Atwater*, 167 Mass. 279; *Ford v. Mount Tom Sulphite Co.*, 172 Mass. 544.

¹⁴ *Bethlehem Iron Co. v. Weiss*, 100 Fed. Rep. 45.

work,¹ all have been held assumed by infants of sufficient mental capacity and understanding to appreciate the danger to which they are subjected.

¹ *Texas & Pac. Co. v. Smith*, 61 Fed. Rep. 524; *Pennsylvania Co. v. McCaffrey*, 139 Ind. 430. Although under age, where a minor knows and appreciates the danger of his employment, or it is obvious, he assumes the risk, the same as an adult. *Carter v. Baldwin*, 81 S. W. Rep. 204; *Williams v. Belmont Coal & Coke Co.* (W. Va. 1904), 46 S. E. Rep. 802. "A complaint for personal injuries showed that plaintiff, 18 years of age, while at work in defendant's steel works, stepped on the edge of an uncovered vat of molten metal to hammer a cogwheel into place, pursuant to defendant's direction, and struck and missed the wheel, and was thus forced to swing round and fall into the metal. The negligence charged was a failure to cover the vat and to inform plaintiff as to the danger, knowing the same, and that he was without experience, and that a missing blow would throw him into the metal; but it was not averred that he did not know for what the vat was used, nor that he lacked opportunity to observe it for himself. *Held* to show that he assumed an open and obvious risk, notwithstanding averments of inexperience and want of knowledge of the danger on the employee's part." *Corning Steel Co. v. Pohlplotz* (Ind. App. 1902), 61 N. E. Rep. 476.

CHAPTER XI.

RISKS THAT ARE NOT ASSUMED.

SECTION 233. Precedents for plaintiff's counsel.

- 234. Negligence of master not assumed.
- 235. Injury from statutory negligence not assumed.
- 236. Latent defect — Breaking of iron handle.
- 237. When breaking of rope not assumed.
- 238. Injury from breaking of board cover to pit.
- 239. Obvious risks, due to foreman's negligence.
- 240. Injuries while obeying master's orders.
- 241. Dangerous machinery — Promise to repair.
- 242. Flying particles of steel or similar substances.
- 243. Incompetency of fellow-servant.
- 244. Injuries from failure to inspect roof.
- 245. Returning upon unexploded blast, under orders.
- 246. Other injuries from powder explosions.
- 247. Breaking of appliances.
- 248. Injury from defective scaffold.
- 249. Jury question, unless risk obvious, or danger understood.

§ 233. Precedents for plaintiff's counsel. — As assumed risk is one of the most frequent and successful defenses in personal injury actions, it is often a source of great relief to counsel for the plaintiff to find a precedent in point, to enable the plaintiff to obtain a submission of his cause to the jury. As a list of cases, wherein the question of the plaintiff's non-assumption of the risk, in mining actions, can only be consulted by reference to general digests or the mass of case law on the subject, it is hoped the pages of this chapter may save some few lawyers a little toil and enable the injured plaintiff, in a meritorious action, to have the benefit of a "case in point."

§ 234. Negligence of master not assumed. — The law never implies anything but a reasonable contract, as

the law itself is based upon reason,¹ and as it would be unreasonable to imply that the servant agreed to assume risks arising from the employer's negligence, on entering the employment, and thus permit the employer to take advantage of his own wrong, dangers arising from the negligence of the employer are not, generally, held to be assumed by the employee.²

§ 235. **Injury from statutory negligence not assumed.** — For the reason that injuries from the negligence of an employer are not held to be within the implied contract of the employee to be assumed by him as incident to his employment, and because such an interpretation would practically abrogate statutes, enacted for the benefit of employees, and enable employers to take advantage of their own breach of statutory duty, it is quite generally held that injuries from the breach of a statutory duty are not assumed.³

¹ Bl. Com., Chap. I.

² "Assumption of risk does not apply where there is negligence on the part of the master in furnishing suitable instrumentalities for doing the work." *Boucher v. Robeson Mills* (Mass. 1903), 65 N. E. Rep. 819. "A servant does not assume the risk of injury from the negligence of the master in failing to exercise ordinary care to make the place where the servant works reasonably safe, considering the nature of the employment." *Swenson v. Bender* (U. S. C. C. A., Cal. 1902), 114 Fed. Rep. 1. "A servant does not assume the risk of accident and injury due to the failure of the master to exercise reasonable care in furnishing him with a reasonably safe place to do his work." *Himrod Coal Co. v. Clark*, 99 Ill. App. 332. "An employee working in a coal mine has a right to presume that the room where he is sent to work is in a reasonably safe condition, unless by the use of ordinary care he may discover the contrary." *Diamond Block Coal Co. v. Cuthbertson* (Ind. App. 1903), 67 N. E. Rep. 558.

³ "An employee in a coal mine does not assume the risk from omission of the mine owner to establish the code of elevator signals required by Burns' Rev. St. 1901, § 7470; the doctrine of assumption of risk not applying where the injury occurs by reason of the negligent non-observance of a positive and fixed duty enjoined by statute." *Island Coal Co. v.*

§ 236. Latent defect. — Breaking of iron handle. — As defects that are not patent are not readily observable and could not be readily seen and appreciated, by an employee, they are not assumed, as incidents of his work, but it is only those that are apparent, or with which he is familiar, that are assumed.¹ Accordingly, it is held, that a laborer engaged in unloading coal from a wagon, who is injured by the breaking of the iron bar, or handle, used to raise up the bed of the wagon, to dump the coal, is not precluded from a recovery, under the doctrine of assumption of risk, although the bar may have been welded before the break at the place in question, as he was not shown to be familiar with the nature of iron, or to know that a welded piece was not as strong as any other or that he knew of the defect or appreciated the risk of such breaking.²

Swaggerty, 65 N. E. Rep. 1026. "Under the mines and miners' act (2 Starr & C. Ann. St. 1896, p. 2716, c. 93), which expressly requires a mine owner to furnish sufficient light at the top and bottom of the shaft to insure, as far as possible, the safety of persons getting on and off the cage, the fact that the miner knew that there was no light at the bottom of the shaft is not a defense to an action by the miner for injuries." Spring Valley Coal Co. v. Patting, 71 N. E. Rep. 371; 210 Ill. 342. "Where a master fails to guard the cog-wheels of a machine as required by Rev. St. 1899, § 6433, the servant does not assume the risk thereof, though he may be guilty of contributory negligence if the danger is so great that a prudent person of his years and capacity would have declined to face it." Blair v. Heibel (Mo. App. 1903), 77 S. W. Rep. 1017. "An employee does not assume the risk arising from the employer's violation of a statute regulating the operation of machinery." Brower v. Locke (Ind. App. 1903), 67 N. E. Rep. 1015. For learned contention that statutory negligence should be assumed, see Dresser Emp. Liab., Sec. 51 *et sub.* But see Spiva v. Osage Coal & Min. Co., 88 Mo. 68; Durant v. Coal Co., 97 Mo. 62.

¹ Crawford v. American Steel Co., 123 Fed. Rep. 275.

² Murphy v. Marston Coal Co., 183 Mass. 385; 67 N. E. Rep. 342. "Where an employee is an adult of ordinary intelligence, he impliedly assumes all the ordinary risks incident to the employment—not only those known to him, but also those readily discernible; but not non-obvious or latent risks, in the absence of instruction or information in respect to them." Crawford v. American Steel & Wire Co. (U. S. C. C. A., N. Y. 1903), 123 Fed. Rep. 275.

§ 237. **When breaking of rope not assumed.**— An employee who has but once assisted in lowering timbers by means of a rope, attached to a hoister, being then assigned to other work, does not assume the risk of the breaking of the rope, even though he knows that it parted on the day previous to that when the injury was received, on account of the negligence of a workman, as it was not shown that he had actual knowledge of any defect therein, as he had a right to presume that the master would substitute a new rope for the one that broke.¹

§ 238. **Injury from breaking of board cover to pit, not assumed.**— In an Illinois case, an employee had been employed a week or so, in the defendant's boiler room, and was injured by the breaking of a board cover to a catch-basin, used to hold hot water, his leg being scalded by his falling into the pit. The evidence tended to show that the defendant knew the cover was dangerous; that the effect of steam from the hot water, on the board, was to weaken it and render it more apt to break easily; the plaintiff had no knowledge that the steam would have a tendency to soften the wood and make it more apt to break than if it was subjected to such conditions and that this condition would be disclosed only by a careful inspection and it was not a part of the plaintiff's duties to inspect the board; it was held that he did not, as a matter of law, assume the risk of such injury.² And in Missouri, where the evidence was conflicting as to the completion of the work, whereby a hole should have been covered and the negligence of the plaintiff in not seeing to the covering of the pit, it was held to be a question for the jury, whether or not the plaintiff assumed the risk of an injury from stepping into the pit when the board was off.³

¹ Geldard v. Marshall (Oregon, 1903), 73 Pac. Rep. 330.

² Wrisley Co. v. Burke, 208 Ill. 250; 67 N. E. Rep. 818.

³ Sinberg v. Falk Co., 98 Mo. App. 546; 72 S. W. Rep. 947.

§ 239. **Obvious risks, due to foreman's negligence.** — Although it is the general rule that an employee assumes all risks of a patent or obvious nature, regardless of the cause of defect, in Massachusetts, it is held, under the statute, that the rule that an employee cannot recover for an obvious risk, but assumes the dangers therefrom, does not apply, where the accident was caused by the negligent act of the employer's superintendent or foreman, by reason of the statute of that State.¹

§ 240. **Injuries while obeying master's orders.** — An employee, injured while obeying the express orders of the master, does not assume the risk, even though he has some knowledge of the dangers, attendant upon the work he is ordered to do, but the danger must be such that an ordinarily prudent person would not have encountered it.²

¹ *Murphy v. City Coal Co.*, 172 Mass. 324; 53 N. E. Rep. 503.

² "Where a servant is ordered by his master to perform a dangerous work, and is injured thereby, the master is liable, unless the danger is so imminent that no man of ordinary prudence would incur it." Judgment, 101 Ill. App. 527, affirmed; *Slack v. Harris*, 65 N. E. Rep. 669; 200 Ill. 96. "Plaintiff, who was employed about blast furnaces for the reduction of the iron, was engaged on the ground hauling iron to the furnace, and had never worked on the top of the furnace, where workmen were often overcome by gas and had to be relieved. A shanty was constructed on the platform at the top of a furnace for the purpose of affording the men a place to 'spell off' when affected by the gas. The shanty contained a stove, a bench, and blocks of wood on which the men sat. Plaintiff had been on top of the furnace on two occasions to sweep, and when he was there no gas was escaping. On the morning of the injury plaintiff was ordered by the foreman to go to the top of a furnace other than the one around which he worked, and was not informed of the conditions, or given any information as to the danger he was likely to meet there, or informed that he was at liberty to come down when affected by the gas. The foreman followed plaintiff about five minutes after he went to the top, and found him with his head out of the window trying to get fresh air, and ordered him to take the place of a man who had been overcome by gas. In a short time plaintiff again went to the shanty. He sat down, and, becoming unconscious, fell on

§ 241. Dangerous machinery — Promise to repair. —

An employee has a right, in the first instance, to act upon the presumption that the employer has performed his duty and provided a reasonably safe place, or appliances or machinery, and the rule is the same, after a discovery of a danger or defect and a promise to repair by the employer and, in such case, the employee has a perfect right to continue at his work, for a reasonable time, relying upon the promise or assurance, on the employer's part, to repair or remedy the defect.¹

the hot stove, sustaining the injuries complained of. *Held* insufficient to show that plaintiff assumed the risk of injury from the gas." *Illinois Steel Co. v. Ryska*, 102 Ill. App. 347, judgment affirmed 65 N. E. Rep. 784; 200 Ill. 280. "In an action for injuries to employee, evidence *held* sufficient to sustain verdict that plaintiff had not assumed the risk from which he was injured." *Jensen v. Commodore Min. Co.* (Minn. 1904), 101 N. W. Rep. 944. "An employee, in obeying his master's express orders, does not assume the risk, even though he has some knowledge of the dangers attendant on the work he is ordered to do, but the danger must be such that an ordinarily prudent person would not encounter it." *Illinois Steel Co. v. Ryska*, 65 N. E. Rep. 784; 200 Ill. 280. "One on whom a wall of a brick kiln fell a few minutes after he was put to work there setting bricks, which was not his usual duty, will not be held to have assumed the risk, or to have been negligent in working there, though the dangerous condition was more or less apparent, he not having noticed it, and the foreman and other men, whose duty it was to work there all the time, having continued to do so under the belief that the wall would stand till strengthened by the bricks that were being laid." *Browning v. Kasten* (Mo. App. 1904), 80 S. W. Rep. 354. "A servant does not assume the risk involved in carrying out a direct command of the master as to the method of performing certain work, unless he acts as no reasonably prudent person would act under like circumstances." *Henrietta Coal Co. v. Campbell*, 71 N. E. Rep. 863; 211 Ill. 216. "A servant employed in hauling cars loaded with coal in a mine, who relied on an assurance given by a fellow-servant, held to assume the risk." *Collingwood v. Illinois & I. Fuel Co.* (Iowa), 101 N. W. Rep. 283.

¹ "Plaintiff's petition alleged that he was employed by defendants in pushing cars on a tramway elevated 20 feet from the ground; that the tramway was negligently constructed, and became out of repair, whereby the rails spread, causing the car which he was pushing to leave the track; and that in attempting to save the load he was thrown off and

§ 242. **Flying particles of steel or similar substances getting in employee's eye.** — The rule that an employer is not liable for an injury to an employee, resulting from an accident, because, through chance, an employee happened to be at the place where a flying particle of steel, or similar substance, happened to strike him, does not apply to an injury from such substance, where the cause of the breaking of the steel which occasions the injury is the negligence of the employer, for, in such case, it cannot be said that the negligence of the defendant was not the approximate cause of the injury, notwithstanding the existence of the element of chance that the employee happened to be located at the particular place where the flying particles struck him.¹

§ 243. **Incompetency of fellow-servant.** — While an employee assumes the risk of injuries due to the negligence

seriously injured. The evidence showed that both plaintiff and defendants knew that the tramway was defective, and defendant's agents promised to repair it. *Held*, that there was nothing in such fact to preclude plaintiff from recovering damages for the injury so sustained." *Prophet v. Kemper* (Mo. App. 1902), 68 S. W. Rep. 956. "In an action for personal injuries received by a servant, a boy 17 years old, and of average intelligence, by being caught in uncovered gearings attached to a spinning jack, the question of his assumption of the risk was for the jury, in view of the complexity of the machinery, the failure to warn the plaintiff and the presumption on behalf of plaintiff that the master had performed his duty." *Slack v. Carter & Rogers* (N. H. 1903), 56 Atl. Rep. 816.

¹ "Where a servant employed as an ordinary laborer in a mill was holding a steel rod while the other servants were hammering the end thereof in order to fashion it into a piston rod for an engine, and a splinter of steel flew from the rod and entered his eye, the risk was not one assumed by him." *Republic Iron and Steel Co. v. Ohler* (Ind. 1903), 68 N. E. Rep. 901. "Where, in an action for injury to an employee, caused by spalls of rock flying from under the stroke of a sledge hammer, with the defective condition of the handle of which he was familiar, it is for the jury whether the defects in the handles were of such character as would deter a person of ordinary prudence from using them because it would not be safe to do so with the exercise of reasonable care." *Nash v. Dowling*, 93 Mo. App. 156.

of his competent fellow-servants, he does not assume the risk of injury from the incompetence of his co-employees, unless he is familiar with the fact of such incompetency and has failed to report it to his employer, who was ignorant thereof, because the employer owes the same duty of providing competent and skilled employees that he does to select proper appliances, and is responsible for a failure to discharge this duty in case of a resulting injury.¹

§ 244. **Injuries from failure to inspect roof.** — As the failure of the master to perform the duty of inspection, whether enjoined by the special provisions of a statute requiring it, or existing by virtue of the common law, is but a phase of negligence likely to occasion injury from a defective roof, owing to a failure to inspect, it is held not to be assumed by an employee, unless the danger of the roof is open and obvious to one of the experience and capacity of the injured employee.²

¹ See chapter *Sufficient Number and Competent Employees*. "A servant is not chargeable with knowledge of the incompetency of a fellow-servant until he has notice thereof by information, or by circumstances reasonably sufficient for that purpose." *Giordano v. Brandywine Granite Co.* (Del. 1901), 62 Atl. Rep. 332. "Where the defect in the tool taken by a servant is obvious, he who takes it assumes the risk; but he cannot assume an obvious risk in such case of a fellow-servant who does not know of the danger." *Campbell v. T. A. Gillespie Co.*, 55 Atl. Rep. 276.

² The Court of Appeals of Missouri has recently held that an injury from an unsafe roof was not assumed, although it was obvious. *Carter v. Baldwin*, 81 S. W. Rep. 204. "Where plaintiff was engaged to assist an engineer in locating an entry in a coal mine, and in the performance of his duties was stationed at a point in the entry of the mine, and while standing there was injured by the falling of coal and stone from the roof of the mine, he was entitled to assume, before entering the mine, that defendant had properly inspected the roof and had made it reasonably safe for plaintiff to enter." *Wilson v. Alpine Coal Co.* (Ky. 1904), 81 S. W. Rep. 278. "Where, in an action for injuries to a servant in a mine by material falling from the roof thereof, there was no evidence that any effort had been made by defendant or its representatives to ascertain the

§ 245. Returning upon unexploded blast, under orders.—In the case of injuries from unexploded shots, since the danger from such sources is very great, if the employer or his representative has notice of an unexploded blast, a proper regard for the safety of the employees would require that sufficient time should elapse between the failure of the powder to explode and the return of the miners, as defects in the fuse is a frequent cause of delayed explosion and injuries from returning to unexploded shots too soon is a frequent cause of injury. An employer, or his representative, is, therefore, held guilty of negligence, in ordering a miner to return too soon upon an unexploded blast, and as the miner in such case is entitled to rely upon the superior judgment of his employer, or his representative, he is held not to assume the risk of such an injury.¹

condition of the roof, after a certain blast, before calling and putting plaintiff to work under it, a requested instruction that, if the danger of such falling material could not have been ascertained or prevented by the exercise of reasonable care on defendant's part, defendant was not liable, was properly refused." *Tennessee Coal, Iron & R. Co. v. Garrett* (Ala. 1904), 87 So. Rep. 855. "A servant, employed in a coal mine to haul cars of coal from the rooms where the coal is mined to the hoisting shaft, is chargeable with notice of every fact which he would have known, had he exercised ordinary care; but, as it is the duty of the owner of the mine to furnish a reasonably safe entry, the driver of the coal car may rely on that duty being performed, and is not required to test the roof of the entry through which he passes, nor chargeable with knowledge of its condition, further than the knowledge he would ordinarily obtain in the discharge of the work he is employed to perform, and, if he is injured by slate falling from the roof on account of the negligence of the mine owner, he should recover." *Davis v. Turner* (Ohio, 1903), 68 N. E. Rep. 819.

¹ "A miner and the mine boss prepared three blasts. The miner lit one and the boss a second, whereupon the miner retired up the shaft, while the boss attempted to light the third. The boss joined the miner, whereupon two explosions occurred. The boss then ordered the miner to return and light the third blast. As the miner reached the blast, it exploded, injuring him. *Held*, that the miner did not assume the risk." *Bane v. Irwin* (Mo. 1904), 72 S. W. Rep. 522. "In an action for per-

§ 246. **Other injuries from powder explosions.**— Whenever the injury to a miner from an explosion of dynamite can be traced to the negligence of the employer, on account of the great care necessary in the use of such material,¹ unless the experience of the injured employee is such that he could be said to understand and appreciate the nature of the risk, he will not be held to have assumed the danger, as an incident of his employment.² A miner has been held not to assume the risk of a substitution of a higher grade explosive, for a lower grade,³ or the danger of an explosion from powder being placed too near a fire to thaw.⁴

§ 247. **Breaking of appliances.**— If an appliance which an employee is required to use is so defective that an inspection would have disclosed the defect, but the experience of the employee is such that he could not, as a matter of law, be charged with a knowledge of such defect, then the failure on the part of the employer to discover the defect would be held to be such negligence, as would render him liable to an injured employee and such em-

sonal injuries received while drilling out an unexploded blast in a rock, it appeared that defendant's vice-principal in charge of the quarry, without himself making an examination of the hole, ordered plaintiff and other laborers to clean it out. While doing so, the blast exploded, causing the injury sued for. *Held*, that there was sufficient evidence of negligence to submit to the jury." *Harris v. Balfour Quarry Co.* (N. C. 1904), 49 S. E. Rep. 95.

¹ See chapter *Injuries from Powder Explosions*.

² See chapter *Assumption of Risks in Mines*.

³ A miner does not assume the risk of an explosion of dynamite where a higher grade explosive has been substituted for a lower grade, without notice or warning to him. *Chambers v. Chester*, 172 Mo. 461; 72 S. W. Rep. 904.

⁴ A miner does not assume the risk of injury from dynamite exploding, placed near a fire to thaw, but the negligence of the plaintiff, or the assumption of risk, would be a jury question. *Angel v. Jellico Mining Co.*, 74 S. W. Rep. 714.

ployee would not be held, as a matter of law, to assume the risk of injury therefrom.¹

§ 248. **Injury from defective scaffold.** — While a miner assumes the risk of injury from a defective scaffold where the material is selected and the scaffold is made by himself or a fellow-servant,² he is not held to assume the risk of a defect in the scaffold, where the master or his vice-principal is guilty of negligence in the selection of faulty material or a defectively constructed structure, but in all such cases the employer, in cases of injury to an employee, is held liable.³

§ 249. **Jury question, unless risk obvious or danger understood.** — The rule is almost universally applied that a servant does not assume the risk of dangers, as a matter

¹ "In an action for the death of plaintiff's decedent a verdict for plaintiff will be sustained where the evidence shows that the deceased was killed by the breaking of a chain which was defective when bought, and of such a character that it could have been discovered by due inspection." *Finnerty v. Burnham* (Pa. 1908), 54 Atl. Rep. 996. "Plaintiff was injured while unloading coal by the breaking of the iron handle used to raise the body of the wagon. He was an experienced driver, and had used the handle which broke as well as similar ones. The handle had been welded where it broke. There was nothing to indicate that it was not sound. He was not acquainted with the art of welding iron, and had had no experience that would enable him to determine that the handle would likely break when put to the usual strain of lifting a wagon loaded with coal. *Held*, that since the defect in the handle was latent, and plaintiff had no skill which would enable him to discover that it was unsafe, he did not assume the risk." *Murphy v. Marston Coal Co.*, 188 Mass. 885; 67 N. E. Rep. 842.

² *White's Mines and Mining Remedies*, Sec. 464.

³ "Where a servant testified that he did not know of a defect in a derrick which occasioned his injury, and the evidence did not establish, as a matter of law, that he had occasion to know it, he did not assume the risk of injury therefrom." *Bernard v. Pittsburg Coal Co.* (Mich. 1904), 100 N. W. Rep. 896; 11 Detroit Leg. N. 246. An employee does not assume the risk of unsafe timbers in a scaffolding, that the master has had erected. *Westland v. Gold Coin Min. Co.*, 101 Fed. Rep. 59.

of law, unless the risk is so obvious that an ordinarily prudent person, under the same or similar circumstances, would not have continued at the employment, or, if not so obvious, the risk was one incident to the work of the employee, as customarily conducted, in the absence of negligence on the part of the employer.¹

¹ *Hammon v. Central Coal and Coke Co.*, 156 Mo. 282; *Carter v. Baldwin*, 81 S. W. Rep. 204. "An employee cannot be said, as a matter of law, to have assumed the risk incident to his employment, unless such assumption is shown by undisputed evidence, or is so clearly proven that no reasonable inference can be drawn to the contrary." *Revolinsky v. Adams Coal Co.* (Wis. 1908), 95 N. W. Rep. 122. "An employee does not assume all the risks incident to his employment, but only such as are usual, ordinary, and remain so incident after the master has taken reasonable care to prevent or remove them, or, if extraordinary, such as are obvious, and expose him to danger so imminent, that an ordinarily prudent and careful man would not enter on or remain in the employment." *Malott v. Hood*, 66 N. E. Rep. 247; 201 Ill. 202.

CHAPTER XII.

CONTRIBUTORY NEGLIGENCE OF MINER.

SECTION 250. What the term implies.

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- 262. When effect of plaintiff's negligence avoidable.
- 263. Working under loose or dangerous rock.
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- 269. Defects in scaffolding and platforms.
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- 271. Uncovered cogs, set-screws and gearing.
- 272. Dangerous positions — Under rising bucket.
- 273. Injuries from ore cars.
- 274. Striking match, where mine contains gas.
- 275. Permitting clothing to catch on machinery.
- 276. Negligence in adjustment of belt.
- 277. Injury from defective ladder.
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- 280. Selecting more dangerous way to perform duty.
- 281. Frequenting unused portions of mine.
- 282. Acts in emergencies.
- 283. Youthful and inexperienced employees.
- 284. Orders and assurances of safety.

§ 250. **What the term implies.**—Contributory negligence, by a writer of recognized ability, has been defined to be “such an act or omission, on the part of the plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause, or occasion of the injury complained of.”¹ An injury is, therefore, said to be due to the plaintiff’s contributory negligence, whenever it was caused by a want of ordinary care, on his part, and this lack of ordinary care occasioned the injury. The plaintiff may have been ever so negligent, in the performance of his duty, at the time of the injury, but unless such negligence, on his part, contributed to produce the injury complained of, he would not be denied a recovery, upon this ground.² Whenever the plaintiff, under the peculiar circumstances of the case, has failed to use such care as an ordinarily prudent person would exercise, under similar circumstances, he will, generally, be denied a recovery,³ but such want of ordinary care, constituting contributory negligence, will bar a recovery, only where, under all the circumstances of the case, it was the efficient and proximate cause of the injury.⁴ But it is not essential that such contributory negligence should have been the sole and direct cause of the injury, for if the injury was caused by the joint and concurring negligence of the plaintiff and defendant, and the

¹ Beach Con. Neg., Sec. 7, p. 8. See Lord Ellenborough’s opinion in the leading and important case of *Butterfield v. Forrester*, 11 East, 60. See also *Faulkner v. Mammoth Mining Co. (Utah)*, 66 Pac. Rep. 799.

² *Neanow v. Utrech*, 46 Wis. 587. The relation of the plaintiff’s negligence to the accident must not be in a remote or speculative sense only, but in the natural and ordinary course of events, as one event is known to precede or follow another. *Sutton v. Wauwatosa*, 29 Wis. 21; *Harris v. Union Pacific Co.*, 4 McCreary, 454.

³ *Meyers v. Chicago &c. Co.*, 103 Mo. App. 268; 77 S. W. Rep. 149.

⁴ *Hone v. Mammoth Mining Co. (Utah)*, 75 Pac. Rep. 881.

injury would not have resulted without the negligence of the other party, then the law will bar a recovery on the part of the plaintiff.¹ From these considerations, it is apparent that the term is more or less a relative one, depending upon the exigencies of each particular case and the precautions which should prompt an employee, under the peculiar circumstances of his situation — as said by an eminent jurist, “like the mercury in the thermometer, determines to what degree prudence shall rise, in order to reach the mark of *ordinary care*.”²

§ 251. **Distinguished from assumed risk.** — The two doctrines of contributory negligence on the part of the plaintiff and his assumption of the risk which resulted in his injury, as separate and distinct defenses on the part of the defendant, are entirely distinct, and, in most cases, cannot be used interchangeably, without confusion.³ The defense of assumed risk, arises out of the implied contract of the common law, under which an employee, on entering into a contract of employment, was legally held to have

¹ *Hanhelde v. St. Louis &c. Co.*, 104 Mo. App. 328; 78 S. W. Rep. 820.

² Judge Sherwood, in *Lamb v. Mo. Pac. Co.*, 147 Mo. l. c. 204. In his masterly opinion, in *Priestley v. Fowler*, Lord Abinger said: “The very relation of master and servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself.” 3 Mees. & W. 1; M. & H. 305; 7 L. J. N. S. 42. For similar expression see *Russell Creek Coal Co. v. Wells*, 96 Va. 416; 31 S. E. Rep. 614; *Deep Mining &c. Co. v. Fitzgerald*, 21 Colo. 533; 43 Pac. Rep. 210. The omission of an employee to perform some act, which if done would have avoided the injury to himself, will prevent a recovery for such injury. *Deep Mining & Dev. Co. v. Fitzgerald*, 21 Colo. 533; 43 Pac. Rep. 210; *McCarthy v. Whitney Iron Works*, 48 La Ann. 978; 20 So. Rep. 171. The relation of master and servant does not imply any obligation upon the part of the master to take more care of the servant than the servant is willing to take of himself. *Karr Supply Co. v. Kronig*, 167 Ill. 560; 47 N. E. Rep. 1051. See *Priestley v. Fowler*, *supra*.

³ *Herbert v. Mound City Co.*, 90 Mo. App. 305.

agreed to assume all the risks growing out of dangers that were incident to the prosecution of the business in which he engaged, when rightfully conducted. Contributory negligence is negligence on the part of the plaintiff, independently of any express or implied contract relation which causes or contributes to cause his own injury.¹ However, it may and frequently does happen that in assuming a dangerous place, with knowledge of the risk, the employee

¹ If the danger was so threatening that a person of ordinary prudence would not have faced it, then plaintiff is guilty of contributory negligence. *Settle v. R. R. Co.*, 127 Mo. 836. But assumed risk includes all such threatening dangers and those ordinarily incident to the service, although not so impending. *Minnier v. Sedalia &c. Co.*, 167 Mo. 99. Assumption of risk and contributory negligence are differentiated in the recent case of *St. L. &c. Co. v. Miller* (126 Fed. Rep. 495), where the court held that "Assumption of risk and contributory negligence are separate, distinct defenses; the former rests in contract; the latter, in tort." Until the emphatic and deep marked line of demarcation was drawn, by Judge Goode, in the above case of *Herbert v. Mound City Company*, the courts of Missouri, upon the two doctrines of contributory negligence and assumption of risk, were in irreconcilable confusion. One of the most thorough of the recent text-book writers upon the law of Master and Servant, speaking of the Missouri cases, which are *sui generis*, upon this subject, says: "The formal doctrine, which has been evolved from this supposed identity, seems to be peculiar to Missouri, and may be said to represent the high water mark of the confusion between the defenses." *Labatt Mas. & Serv.*, Sec. 811, p. 771. See *Olcorn v. C. & A. Co.*, 108 Mo. 81; 18 S. W. Rep. 188; *Thorp v. Mo. Pac. Co.*, 89 Mo. 650; 2 S. W. Rep. 3; 58 Amer. Rep. 120; *Wormington v. A. T. & C. Co.*, 46 Mo. App. 159; *Coursy v. Vulcan Iron Works*, 62 Mo. 85; *Bender v. S. & L. & S. F. Co.*, 137 Mo. 240; 37 S. W. Rep. 182. In Alabama (*Eureka Co. v. Bass*, 81 Ala. 200; 8 So. Rep. 216; 60 Am. Rep. 152) and Wisconsin (*Kraft v. Meyer*, 92 Wis. 252; 65 N. W. Rep. 1039), the courts seem to have fallen into a similar error. The distinction between assumption of risk and contributory negligence is drawn in the following cases: *Bodie v. Charleston & Western Co.* (S. C. 1901), 10 Amer. Neg. Rep. 473; *Dempsey v. Sawyer* (Me.), 10 Amer. Neg. Rep. 285. Contributory negligence and assumed risk are inconsistent, because if the employee assumed the risk, he cannot recover, though he exercised the highest degree of care. The defenses rest upon different principles; are inconsistent and the presence of the one excludes the existence of the other. *Ball v. Gussenhoven*, 29 Mont. 321; 74 Pac. Rep. 871.

in thus exposing himself, would really be guilty of contributory negligence and, to this extent, the two defenses are similar and, in this sense, an employee who assumes a risk may, to some extent, be held guilty of negligence. The defense of assumed risk, however, is not dependent upon any negligence of the employee, but exists by reason of the implied contract of the employment, while negligence, or a wrongful act, is usually necessary to constitute the defense of contributory negligence.¹

¹ "Assumption of risk and contributory negligence are wholly different things in the law. Assumption of risk rests in the law of contract; the very word 'assumption' imports a contract, or some kindred act of an unconstrained will. *Dempsey v. Sawyer*, 95 Me. 295; *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 578. While the doctrine may be applicable in controversies between other persons than masters and servants, it has its chief application in controversies between parties sustaining that relation. Thus, it has been said that the doctrine of 'voluntary assumption of a risk,' as distinguished from contributory negligence, is generally applied in cases arising between employer and employee, where an employee, without any valid excuse for so doing, voluntarily undertakes to work with a tool or an appliance which is known to be defective, and by so doing assumes the risk of getting hurt, and thereby releases his employer from liability. *Chicago & N. W. R. Co. v. Prescott*, 59 Fed. Rep. 287; 28 L. R. A. 654. And assumption of risk has been said to be 'a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant.' *Narramore v. Cleveland & C. R. Co.*, 96 Fed. Rep. 298, quoted with approval in *Bauer v. American Car & C. Co.*, 132 Mich. 587; 94 N. W. 9. 'Assumption of risks rests in the law of contract and involves an implied agreement by the employee to assume the risk ordinarily incident to his employment, or a waiver, after full knowledge of an extraordinary risk, of his right to

§ 252. Should be specially pleaded — Burden. — The burden of proof, in actions for negligence, where the defense is that of contributory negligence, upon the part of the plaintiff, is upon the party who alleges such contributory negligence. The plaintiff, in the absence of such proof, is presumed to have properly discharged his duty, and unless the testimony on the part of the plaintiff him-

hold the employer, for a breach of duty in this regard.' *Bodle v. Charleston &c. R. Co.*, 61 S. Car. 461; 29 S. E. Rep. 715. Contributory negligence, on the other hand, is a breach of the duty of due care imposed by the law (*Dempsey v. Sawyer*, 95 Me. 295), and does not rest in the law of contracts, but 'in the law of torts, as applied to negligence, and when such defense is established the plaintiff's action is defeated, not because of any agreement, express or implied, but because his own misconduct was a proximate cause of the injury.' *Bodle v. Charleston &c. R. Co.*, 51 S. Car. 468. The existence of negligence on the part of the person injured is an essential element of the defense of contributory negligence, but the doctrine of 'assumed risk,' obtains without necessary reference to the existence of negligence. *Texas &c. R. Co. v. Bryant*, 8 Tex. Civ. App. 184. That doctrine is based, not upon the negligence of the person injured, but upon a knowledge of the danger to which he is exposed, and it is often applied when there has been no carelessness at all. 'Contributory negligence and assumption of risk are entirely different things in the law. Although the two questions may both arise under the facts of a case, yet they are wholly separate and distinct. Every person suing for a personal injury must show that he was in the exercise of ordinary care and caution for his own safety, so that the question of contributory negligence may be involved in every case; but an employee may have assumed a risk by virtue of his employment, or by continuing in such employment with knowledge of the defect and danger, and if he is injured thereby, although in the exercise of the highest degree of care and caution and without any negligence, yet he cannot recover.' *Chicago &c. R. Co. v. Heerey*, 203 Ill. 492. In *Hesse v. Railroad Co.*, 58 Ohio St. 167, 169; 50 N. E. 355, Judge Shauck, speaking for the Supreme Court of Ohio, said: 'Acquiescence with knowledge is not synonymous with contributory negligence. One having full knowledge of defects in machinery with which he is employed may yet use the utmost care to avert the dangers which they threaten.' On the other hand, knowledge of the danger is not conclusive upon the question of contributory negligence. Obviously such knowledge may lead a person to the exercise of extraordinary care." *Bowen, J.*, in *Thomas v. Quartermaine*, 18 Q. B. Div. 697; 7 Law Notes, p. 89.

self, tends to establish such defense of contributory negligence, the defendant must establish its existence, by a preponderance of the evidence in the case.¹ Like other special defenses set up to defeat a recovery by the plaintiff, the defense of contributory negligence on the part of the plaintiff, must be specially pleaded, to be available as a defense. In discussing the nature of this special plea, on the part of the defendant, the Missouri Supreme Court recently used the following language: "The defense of contributory negligence, on part of a plaintiff, interposed by a defendant, is in the nature of a plea of confession and avoidance, and it has been held, for that reason, by this court, it must be specially pleaded by a defendant, to be available to him. The plea impliedly admits some negligence, on the part of the defendant, but seeks to avoid its consequences, by charging that plaintiff himself contributed to the injury complained of. It is a matter pleaded by the defendant, to avoid the consequences of his own act, and for that reason, the rule has been adopted that it must be specially pleaded by defendant." ²

§ 253. **Doctrine of imputed negligence.** — Whenever the injury to an employee is due to an act of his own agent, or a fellow-servant under his direction, and the negligence of such third person is due to the direction or control of the plaintiff himself, then the negligence of such third person would constitute a valid defense to the action of the injured employee, under whose direction or control the negligence occurred, for his negligence would be imputed,

¹ *Chicago &c. Co., v. Lee*, 66 Kan. 806; 72 Pac. Rep. 266; *O'Reilly v. Brooklyn &c. Co.*, 82 App. Div. 492; 81 N. Y. Supp. 572; *Gay v. Winter*, 84 Cal. 153; *Holland v. Oregon &c. Co.*, 26 Utah, 209; 72 Pac. Rep. 940; *Corbett v. Oregon &c. Co.*, 25 Utah, 449; 71 Pac. Rep. 1065; *Missouri, Kansas & Texas Co. v. Gist (Texas)*, 73 S. W. Rep. 857.

² *Kaminski v. Tudor Iron Works*, 167 Mo., p. 470; 67 S. W. Rep. 221.

in law, to the plaintiff himself.¹ After stating the doctrine of agency, in the law of contributory negligence, and the identity of the third person with the plaintiff, who sues for the injury, Mr. Beach states the rule thus: "Whenever the contributory negligence of the third person is of such a character and the third person is so connected with the plaintiff that an action might be maintained against the plaintiff for damages, for the consequences of such negligence, then, when the plaintiff himself, brings the action, that negligence is, in contemplation of law, the plaintiff's negligence and it is justly imputed to him."² This rule is illustrated, in a Missouri case, by an action by a superior servant, with power of direction and control, through whose order, when being executed by an inferior, such superior servant is injured. In this case, the negligence of the servant giving the order, which resulted in his own injury, will be imputed to his inferior servant, whose act occasioned the injury, and such imputed contributory negligence of the injured employee will preclude his recovery.³

¹ Beach Con. Neg., Sec. 100, p. 129; *Burroughs v. Gas & Coke Co.*, L. R. 5 Exch. 67; L. R. 7 Exch. 96; *Atkinson v. Goodrich & Co.*, 60 Wis. 141; 50 Amer. Rep. 352; *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163; 45 Amer. Rep. 80.

² Beach Con. Neg., Sec. 103, p. 133.

³ *Minster v. Citizens & Co.*, 53 Mo. App. 276. "Plaintiff ordered coal from defendant, and on its arrival ordered the teamster to put the same in a coalhouse. Plaintiff opened the door through which the coal was to be thrown, and asked the driver to throw in a number of lumps to plaintiff for the purpose of making a pile in the doorway. Plaintiff remained in the room, and carried these lumps thrown to her by the teamster and piled them in the doorway, and while she was thus engaged the driver threw in some coal, which struck her hand and severely injured it. *Held*, that the teamster, while engaged in throwing the coal to the plaintiff, was acting under her direction, and not under the direction of his employer, and hence the latter was not liable for his negligence in throwing the coal." *Atherton v. Kansas City Coal & Coke Co.* (Mo. App. 1904), 81 S. W. Rep. 223.

§ 254. A defense to violation of statutory duty.— Since the negligence for which an employer is responsible, in case of a resulting injury to his employees, is simply that breach of a duty owed them which may occasion an injury, there would seem to be no difference, in degree, so far as the liability of the master is concerned, between his violation of a common law duty and the breach of a statutory duty. The fact that the given duty was prescribed by a statute makes it none the less a duty, nor does it increase the duty by being so prescribed. The master is liable for any breach of duty toward his employees which occasions them an injury regardless of whether it is statutory or a common law duty owed to them. This being true, his defenses to actions for breaches of such duties ought on principle to be the same, whether the plaintiff's action is based upon the breach of a duty prescribed by statute law, or common law. To hold an employer liable for the violation of a duty prescribed by statute, the breach of such statutory duty must also have occasioned the injury complained of, and unless it did, there is no liability. If the injury instead of being due to the master's neglect,—either of a statutory or common law duty—was due to the neglect of the servant himself, then, under well recognized rules, the master ought not to be held responsible. In other words, upon principle, the defense of contributory negligence should prevail as well in actions for violations of statutory duty, as in suits for breach of a common law duty.¹ But this rule does not obtain in Illinois, and notwithstanding the employee's negligence may have contributed to produce the injury com-

¹ Dresser Emp. Liab., Secs. 51, 116; Bodell v. Brazil Block Coal Co., 25 Ind. App. 654; Victor Coal Co. v. Muir, 20 Colo. 820; Matta v. Chicago &c. Co., 69 Mich. 109; Taylor v. Carew Co., 142 Mass. 470; Spiva v. Osage Coal & Min. Co., 88 Mo. 68; Senior v. Ward, 28 L. J. Q. B. 189.

plained of, if the mine employer had violated the statute for the protection of his employees, he is liable, although the servant was guilty of contributory negligence.¹

§ 255. **Miner must understand conditions and danger.** — Negligence can only be affirmed in respect to conditions and dangers appreciated by the party charged therewith. Hence, a miner will not be denied a recovery, on the ground of contributory negligence, unless it is established that the conditions and resulting danger were such that he understood it, or ought to have known and appreciated the risk his act would subject him to.²

¹ *Riverton Coal Co. v. Shepard*, 207 Ill. 395; 69 N. E. Rep. 921; *Western Anthracite Coal Co. v. Beaver*, 95 Ill. App. 95, affirmed in 61 N. E. Rep. 835; *Carterville Coal Co. v. Abbott*, 55 N. E. Rep. 131; 81 Ill. App. 279; *Odin Coal Co. v. Denman*, 84 Ill. App. 190; 57 N. E. Rep. 192. Where deceased was killed as a result of a defective roof in a mine, the question of whether or not he was guilty of contributory negligence, so as to defeat a recovery, was held properly submitted, as a defense, in Missouri, under the prop act in *Weston v. Lackawana Min. Co.*, 105 Mo. App. 702. A miner not himself in due care, cannot recover for an injury from violation of the Ohio statute, requiring the mine to be kept free from standing gas. *Krause v. Morgen*, 52 Ohio St. 325; 40 N. E. Rep. 886. Contributory negligence, of an employee, in Illinois, is held to be no defense to the violation of the statute requiring the mine to be fenced, etc. *Catlett v. Young*, 143 Ill. 74; 32 N. E. Rep. 447. The Federal courts, in Illinois, follow the rule established by the State courts that contributory negligence is not a defense to an action for violation of the statute. *Riverton Coal Co. v. Shepard*, 111 Ill. App. 294; *Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co.*, 130 Fed. Rep. 957; *Fulton v. Wilmington Star Mining Co.*, 133 Fed. Rep. 193. Under the Indiana Employer's Liability Act, imposing a liability for the negligence of other employees, an employee is held not to be exempt from the consequences of his own contributory negligence. *Corning Steel Co. v. Pohlplotz*, 64 N. E. Rep. 476.

² *Ozimbierski v. Mott Iron Works*, 56 App. Div. 58; 67 N. Y. Supp. 256; *Folk v. Schaeffer*, 186 Pa. St. 253; 40 Atl. Rep. 401; *Salem Stove &c. Co. v. Griffin*, 139 Ind. 141; 38 N. E. Rep. 411; *Dowling v. Allen*, 6 Mo. App. 195; *Magowan v. Bullion Beck Min. Co.*, 15 Utah, 534; 50 Pac. Rep. 884. "A risk, though known to the servant, is not deemed in law

This rule is illustrated in a Maryland case, where the injury to the miner occurred by being crushed by a car against the side of the tunnel. The evidence showed that he had been accustomed to safely stand at the same place, before the track was straightened, and as he was not familiar with the facts, it was held that he would not be denied a recovery on the ground of contributory negligence.¹ This case is in accord with the great weight of authority, as well as the reason of the situation, for it would be manifestly unfair to hold an employee negligent in failing to adopt precautions that would minimize his danger, when, in fact, he had no knowledge of the danger which threatened him.² This rule, therefore, and the reason underlying it, has given rise to the doctrine that whenever the evidence is conflicting, as to the employee's knowledge of the conditions and dangers that threatened him, then he cannot, as a matter of law, be held guilty of contributory negligence barring his recovery, but the issue as to his knowledge or imprudence in not discovering his danger, should be submitted to the jury.³ But if the em-

to have been assumed unless the danger arising from such risk is, likewise, known by him." *Henrietta Coal Co. v. Campbell*, 112 Ill. App. 452; 71 N. E. Rep. 868; 211 Ill. 216. Mere knowledge of a defective roof will not charge an employee with negligence, so as to prevent a recovery for an injury from falling rock, unless the danger threatens immediate injury, or he could not reasonably have expected that he might safely continue his work. *Smith v. Little Pittsburg Coal Co.*, 75 Mo. App. 177. This is at variance with the rule laid down by the Supreme Court of Missouri. *Minnier v. Sedalia & Co.*, 167 Mo. 99. And if employee knows the danger as well as employer, he is not entitled to notice. *Junior v. Mo. E. L. & P. Co. (Mo.)*, 29 S. W. Rep. 988. A miner will not be presumed to know that a blast has broken through a rib between two drifts. *Summit Coal Co. v. Shaw*, 16 Ind. App. 9; 44 N. E. Rep. 676.

¹ *Baker v. Maryland Coal Co.*, 84 Md. 19; 85 Atl. Rep. 10.

² See *Labatt Mas. & Serv.*, Sec. 819, p. 786.

³ *Hammon v. Central Coal & Coke Co.*, 156 Mo. 232; *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62; 10 S. W. Rep. 484; *Collins v. Greenfield*, 172 Mass. 78; 51 N. E. Rep. 454; *Victor Coal Co. v. Muir*,

ployee appreciated the danger, or the conditions which caused it were obvious, or such as a reasonably prudent man, under the circumstances, ought to have known and understood, in the exercise of ordinary care, then the plaintiff's act, in failing to exercise such care, would constitute contributory negligence.¹

§ 256. What degree of care exacted from miners. — The standard of due care is practically the same, in all vocations, i. e., the care that a prudent person, under like circumstances, would exercise, for his own safety.² But the necessity for greater or less precautions to avoid injury

20 Colo. 820; 88 Pac. Rep. 378; 26 L. R. A. 435; *Mather v. Rillston*, 156 U. S. 391; 89 L. C. P. Ed. 464; 15 Sup. Ct. Rep. 464; *Nicholas v. Crystal Plate Co.*, 126 Mo. 55; 27 S. W. Rep. 516; *Sanborn v. Madera Flume &c. Co.*, 70 Cal. 261; 11 Pac. Rep. 710; *Woodward Iron Co. v. Herndon*, 180 Ala. 864; 80 So. Rep. 370; *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9; 54 N. E. Rep. 567.

¹ *Murphy v. City Coal Co.*, 172 Mass. 324; 52 N. E. Rep. 503. "In order to charge a servant with negligence, it must be shown that he knew, or could have known by the use of ordinary care, that the place where he did his work was dangerous." *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185. "While a servant must take notice of defects which are patent, he is not bound to make an examination for latent defects, and may act on the presumption that the master has used reasonable care in preparing the place for his work, so as to make it reasonably safe." *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185. "In action for injuries to servant, evidence held sufficient to warrant a finding that plaintiff's intestate neither knew, nor by reasonable care could have known, of the defect in the appliance causing his death." *Caven v. Bodwell Granite Co.* (Me. 1904), 59 Atl. Rep. 285; 99 Me. 278. "Whether a servant was guilty of contributory negligence with respect to defective appliances he was using depends, not on the mere fact that he saw or handled the appliances, but rather on whether he knew, or ought by reasonable care to have known, their defective condition." *Caven v. Bodwell Granite Co.* (Me. 1904), 59 Atl. Rep. 285; 99 Me. 278.

² *Labatt Mas. & Serv.*, Sec. 829, p. 813; *Scagel v. Chicago &c. Co.*, 88 Iowa, 380; 49 N. W. Rep. 990; *Reese v. Morgan Silver Min. Co.*, 15 Utah, 458; 49 Pac. Rep. 824; *Tennessee Coal, Iron &c. Co. v. Currier*, 108 Fed. Rep. 19; 47 Cir. Ct. App. 161.

necessarily varies, according to the hazards of the particular business, and as mining, in all its details, is extremely dangerous, miners are required to adopt more precautions than those engaged in less hazardous vocations, but only such as reasonably prudent persons in the same business.¹ In a Kansas case the rule is announced that when a vocation is dangerous, an employee is required to use very great precaution, to avoid an injury.² In Utah it has been held that a miner should be vigilant and careful, in his own behalf, and should use a degree of care, proportioned to the degree of danger in the ordinary discharge of his duties,³ and a similar rule is announced, in Kentucky, where it is held that he should exercise, for his own protection, that degree of care which is commensurate with the character of his occupation and which a reasonably prudent person would use, under like circumstances.⁴ Hence, it will be seen, that the standard is the same in all vocations, but the care and caution increase, in proportion to the risks and hazards of the particular duties of the business.

§ 257. Employer's performance of duty — Miner may rely upon. — As the law presumes that every one will perform his duty, public officials as well as private individuals, it is a legal presumption that the employer has properly discharged his common law or statutory duty toward his

¹ *Peterson v. Wallace*, 28 Eng. Law & Eq. 48; 1 Macq. H. L. Cas. 748; *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah, 468; 11 Pac. Rep. 612; *Union Pac. Co. v. Eades*, 37 Kan. 715; 16 Pac. Rep. 131. "Plaintiff was not relieved from the consequence of his own negligence because his fellow workman committed similar acts of negligence." *Griben v. Yellow Aster Min. & Mill. Co.* (Cal. 1904), 75 Pac. Rep. 839.

² *Union Pacific Co. v. Estes*, 37 Kansas, 715; 16 Pac. Rep. 131.

³ *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah, 468; 11 Pac. Rep. 612.

⁴ *Ashland Coal & Iron Co. v. Wallace*, 101 Ky. 626; 42 S. W. Rep. 744.

employees and, for this reason, the employee, in order to recover for a failure, on the part of the employer, to perform his duty toward him, must, by a preponderance of the evidence, overcome such presumption and establish negligence on the part of the employer. On the other hand, the employee is equally entitled to this legal presumption, in the performance of his duties, as an employee of the mine owner, and before the latter can defeat a recovery, upon the ground of his breach of duty, it must be affirmatively established that such employee has failed to use ordinary care to protect himself from injury. The servant has a legal right to depend upon the performance of his duty, on the part of the employer,¹ and as the master's duty, with reference to furnishing tools, appliances and a reasonably safe place and the other duties imposed upon him, either by the statute or common law, is a continuing duty, toward his various employees,² so his negligence is continuing, in case of a breach of such duty, and where an injury results from such cause, the master cannot avoid liability, on the ground of contributory negligence, on the part of the plaintiff.³

¹ *Diamond Block Coal Co. v. Cuthbertson* (Ind. App.), 67 N. E. Rep. 558; *Himrod Coal Co. v. Clarke*, 197 Ill. 514; 64 N. E. Rep. 282; affirming 99 Ill. App. 332; *Sinclair Co. v. Waddill*, 99 Ill. App. 384; 65 N. E. Rep. 437; *Carroll v. Oil Co.*, 67 N. J. L. 679; 52 Atl. Rep. 275; *O'Brien v. Sullivan*, 195 Pa. St. 474; 46 Atl. Rep. 130; *Cunningham v. Sicilian Asphalt &c. Co.*, 49 App. Div. 380; 63 N. Y. S. 357; *Smeizel v. Odanah Iron Co.*, 116 Mich. 149; 74 N. W. Rep. 488.

² See chapter, *Duties of Mine Employer*. *Alabaster Co. v. Lonergan*, 90 Ill. App. 353; *Morton v. Zwierzykowski*, 91 Ill. App. 462.

³ *Orr v. Southern Co.*, 182 N. C. 691; 44 S. E. Rep. 401; *Portland Gold Min. Co. v. Flaherty*, 111 Fed. Rep. 312; 49 C. C. A. 361; *Indiana Coal Co. v. Buffey* (Ind. App.), 62 N. E. Rep. 279; *Cushman v. Carbon-dale Co. (Iowa)*, 88 N. W. Rep. 817; *Tennessee Coal &c. Co. v. Carrier*, 108 Fed. Rep. 19; 47 C. C. A. 161. An employee is entitled to presume that a hammer, used to break up rock, is a reasonably safe appliance and if it is not he cannot be held guilty of contributory negligence in its

§ 258. **Duty to discover and remedy defects.** — While an employee is entitled to rely upon the performance of his duty by his employer, he is none the less held to a strict account on his own responsibility, with reference to looking out to protect himself from the effects of defects which he might have avoided, in the performance of due care, on his part.¹ It is his duty to use reasonable and ordinary care to discover and avoid the effects of defects open to common observation, and if he fails to do this, he cannot recover for the effects of such failure, in case of a resulting injury. If he places himself in an obviously dangerous position, or in a position in which, in the exercise of ordinary care, he could have ascertained that impending danger confronted him, he cannot recover, if he is injured, because of such want of care, in looking out for his own safety.² Under this rule, however, an employee is not bound to do what he has a right to expect others to do, in the performance of their duty, and he is entitled to rely upon the performance of such duty by others. Accordingly, where an employee in a quarry, was directed, by his superintendent, to mount a large rock, in order to drill a hole therein, he is not under the duty to make a careful inspection of all the surroundings, as he has a right to rely upon the safety of the place where he is directed to work.³ But if an employee has at hand, the means of ascertaining the dangers of his surroundings and fails to make an investigation, but does that which augments his danger, he cannot recover, on account of his contributory

use. *Robbins v. Big Circle Mining Co.*, 103 Mo. App. 78. A miner has a right to presume that a platform or gangway is safely constructed. *Vanesse v. Latsburg Coal Co.*, 159 Pa. St. 403; 28 Atl. Rep. 200.

¹ *Sievers v. Eyre*, 122 Fed. Rep. 734; *Chenall v. Palmer Brick Co.*, 117 Ga. 106; 43 S. E. Rep. 443.

² *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594; *Silviera v. Iversen*, 128 Cal. 187; 60 Pac. Rep. 687.

³ *Mahoney v. Bay State Granite Co.*, 184 Mass. 287; 63 N. E. Rep. 234.

negligence, in case of an injury.¹ And he should know every fact that he would discover, if he exercised ordinary care to keep himself informed along the line of his duty, and a failure to discover defects in the entries or exits of the room in which he was engaged, under circumstances where he ought to have known thereof, will defeat a recovery for an injury therefrom.²

§ 259. **Where duty of repair or fitness of tool, devolved upon plaintiff.** — Since the injured employee is denied a recovery, whenever a failure to use ordinary care, upon his part, contributed to produce the injury for which suit is brought, if the cause of the injury was the selection of an unfit tool or appliance to perform the work with, or a want of repair upon the appliance or implement which occasioned the injury, and the duty of selecting a proper tool or of seeing to the repairs needed thereon was cast upon the injured employee himself, and he had failed to discharge such duty and as a result was injured, then he cannot recover for such resulting injury. It has been held, in Utah, that where the duty was placed upon the injured miner, of repairing and seeing to the repair of a car track, he could not recover for an injury from a want of repair, where he had failed to discharge the duty intrusted to him, as his own want of care, or failure to do his duty, occa-

¹ As where he fails to examine a roof with his light, for loose slate and leaves a prop down, that he knocked out. *Dickinson Coal Co. v. Peach*, 82 Ind. App. 88; 69 N. E. Rep. 189.

² *Wellston Coal Co. v. Smith*, 65 Ohio St. 70; 61 N. E. Rep. 148; 55 L. R. A. 99. An employee is under as great obligation to provide for his own safety, from dangers that are known to him, or are discernible by ordinary care, as the master is to provide for him. *Russell Cr. Coal Co. v. Wells*, Va. 416; 81 S. E. Rep. 614. Contributory negligence will not be predicated merely upon the fact of a miner's failure to discover the defects in the roof. *Blazenic v. Iowa & W. Coal Co.*, 102 Iowa, 706; 72 N. W. Rep. 292; *Island Coal Co. v. Risker*, 18 Ind. App. 98; 40 N. E. Rep. 148.

sioned the injury.¹ And in Pennsylvania, where the injury complained of resulted from the use of a defective "bit" to handle red hot bloom with, and the record showed that the injured employee knew of the defective condition of the tool, before using it, and it was his duty to have selected a "bit" not defective, his negligence would defeat a recovery for an injury from such defective tool.²

§ 260. **Combined negligence of employer and employee.** — To warrant a recovery, by a miner, against his employer, he must establish that his injury was caused by a want of ordinary care on the part of the employer. It is this want of care that constitutes the negligence of the employer, which must have directly occasioned the injury, before a liability therefor would result. The defense of contributory negligence has been said to be but an amplified form of denial, by the defendant, that the injury was caused by his negligence.¹ If, instead of being the direct result of the employer's negligence, alone, the injury results from a want of ordinary care, on the employer's part, combined with a want of ordinary care on the part of the employee, it cannot be truly said to result from the negli-

¹ A miner whose duty it was to repair a defective car track, is guilty of negligence barring a recovery, for an injury from a failure to repair such track. *Butte v. Pleasant Valley Coal Co.*, 14 Utah, 282; 47 Pac. Rep. 77.

² "Where the employer furnishes a sufficient supply of ropes, and suitable supply of ropes, belts, and chains, from which the workmen may select proper ones in attaching articles to a crane to be moved, it is not liable for injury to an employee from the negligence of a fellow workman in selecting a rope insufficient for the article to be moved." *Morrison v. Whittier Mach. Co.* (Mass. 1903), 67 N. E. Rep. 646. The use of a defective bit to carry red hot bloom with in an iron smelter, is contributory negligence, where the employee knew of the defective condition of the tool and it was his duty not to use a defective bit for the purpose. *Devlin v. Phoenix Iron Co.*, 182 Pa. St. 106; 37 Atl. Rep. 927.

³ *McVay v. Waterford &c. Co.*, Ir. L. R. 18; C. L. 159.

gence of the employer any more than it can from that of the employee and there would be a consequent failure of proof, on the part of the one having the affirmative of establishing that the negligence of the employer was the approximate cause of the injury.¹ As tersely put in an Ohio case, "If it took the want of ordinary care of both the employer and employee to produce the injury, both are at fault and there can be no recovery by either. Where both parties are negligent and the injury is caused by such combined negligence, there can be no recovery by either party."²

§ 261. **Concurring negligence of fellow-servant immaterial.** — While the servant on entering into the contract of employment, under the implied contract of the common law, is held to assume the risk of injuries resulting from the negligence of his fellow-servants, he does not, as a part of such contract, assume the dangers occasioned by the combined negligence of a fellow-servant and the employer, for he does not undertake to assume any injury due to his master's negligence, whether the injury results from such negligence alone, or the combined negligence of the master and a fellow-servant. Such a doctrine would permit the employer under an implied contract to avoid the effect of his own wrongful act, when he could not do so by an express contract, under many statutes, as no one is permitted to take advantage of his own wrong.³ The

¹ *Pittsburgh & West. Coal Co. v. Estievenard*, 53 Ohio St. 43; 40 N. E. Rep. 725; *Consolidated Coal Co. v. Borkamp*, 181 Ill. 9; 54 N. E. Rep. 567; see *Illinois Fuel Co. v. Parsons* (38 Ill. App. 182), where the injury to plaintiff was due to his carrying a drill upon a cage, in violation of law.

² *Pittsburg & West Coal Co. v. Estievenard*, 53 Ohio St. 43; 40 N. E. Rep. 725.

³ *Pittsburg &c. Co. v. Henderson*, 87 Ohio St. 549; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Lane v. Atlantic Works*, 111 Mass 186; *Atkinson v. Goodrich Co.*, 60 Wis. 141; 18 N. W. Rep. 764.

concurring negligence of a fellow-servant, therefore, combined with that of a master, will not relieve him from the results of his wrongful act; but if his negligence, as one of the agencies, operated to the injury of his employee, he is held liable therefor the same as though it was the sole and approximate cause of such injury.¹ But if the negligence of a fellow-servant concurs with that of the plaintiff to produce the injury, it is the same as if the injury resulted from the combined negligence of the plaintiff and defendant, and he cannot recover.²

§ 262. **When effect of plaintiff's negligence avoidable.**—The rule that an employer cannot obtain exemption from liability, although the plaintiff was guilty of contributory negligence, if, notwithstanding such contributory negligence, the defendant could have averted the effect thereof and prevented the injury, is quite generally recognized.³ The rule has been thus stated by the United States Supreme Court: “Although the rule is, that if the plaintiff be shown to have been guilty of contributory negligence, which may have had something to do in caus-

¹ *Sherman v. Menominee Co.*, 72 Wis. 123; 39 N. W. Rep. 365; *Cowan v. R. R. Co.*, 80 Wis. 284; 50 N. W. Rep. 180; *Bailey Mas. Liab. Inj. Serv.*, p. 439.

² *Devlin v. Phoenix Iron Co.*, 182 Pa. St. 109; 37 Atl. Rep. 927. As to a minor employee the master was not held to be exempt from liability, because of the concurrent negligence of a fellow-servant, in *Jones v. Florence Min. Co.*, 60 Wis. 268; 57 Amer. Rep. 269. Plaintiff cannot be relieved from the result of his own carelessness, because his co-employees joined in the act which produced his injury, as an injury from either cause would give him no cause of action. *Kaminski v. Tudor Iron Works*, 167 Mo. 462.

³ *Bailey Mas. Liab. Inj. Serv.*, p. 445; *Richmond & Co. v. Yeamans*, 86 Va. 860; 12 S. E. Rep. 946; *Shear. and Redf. Neg.*, Sec. 99, note 10; *Radley v. Londen & Co.*, 46 L. J. Exch. (N. S.) 573; 35 L. T. (N. S.) 637; *Chesapeake & Co. v. Lee*, 84 Va. 642; 5 S. E. Rep. 579; *Hlssong v. Richmond & Co.*, 91 Ala. 514; 8 So. Rep. 776; *Kansas & Co. v. Fitzhugh*, 61 Ark. 341; 33 S. W. Rep. 96.

ing the accident, yet, the contributory negligence, on his part, would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might by the exercise of reasonable care and prudence, have averted the consequences of the plaintiff's negligence."¹ And this case lays down the general rule, substantially as adopted in a majority of the different States.²

§ 263. Same — Working under loose or dangerous rock. — The rule that an employee who knowingly assumes a dangerous place is precluded, by reason of his contributory negligence, in case of an injury, is illustrated, in frequent accidents in mines, from working under or near loose, or dangerous rocks or boulders. In a Montana case, an employee who was accustomed to blast rock in a mine, on the day shift, noticed a suspicious looking rock and thought he would brace it, but failed to do so. On returning to work the next morning, he noticed that the night shift had placed "lagging" along the ledge, which was a custom only when the rock was drilled, or was about to be drilled. He was the first man to come in contact with the ledge of rock in the morning, but without carefully inspecting it, to see if it was safe, he stepped under the ledge, when it fell upon him and injured him, and his contributory negligence was held to defeat his recovery.³ A similar case occurred in Tennessee, where a miner who

¹ *Inland &c. Co. v. Folson*, 139 U. S. 558; 11 Sup. Ct. Rep. 653.

² *Washington Mining &c. Co. v. Barnett*, 19 Ky. L. R. 958; 42 S. W. Rep. 1120; *Sharp v. Mo. Pac. Co.*, 161 Mo. 44; 61 S. W. Rep. 829; *Louisville &c. Co. v. Hunt*, 101 Ala. 34; 13 So. Rep. 130; *Evarts v. St. Paul M. & M. Co.*, 56 Minn. 141; 57 N. W. Rep. 459; 22 L. R. A. 663.

³ *Cummings v. Helena Smelting & Red. Co.*, 26 Mont. 434; 68 Pac. Rep. 852. See, also, *Bedford Quarries Co. v. Thomas* (Ind. App.), 63 N. E. Rep. 880; *Andrews v. Tamarack Mining Co.*, 114 Mich. 375; 72 N. W. Rep. 242; *Schlacker v. Min. Co.*, 89 Mich. 253.

noticed a loose and dangerous rock, not only took a dangerous position under it, but also increased his danger, by excavating under and around the rock, which fell and crushed him.¹ His negligence was also held to bar a recovery. And, in Alabama, a like holding was announced, in a case where plaintiff and his co-servant were driving a heading and had uncovered a portion of a rock, past the timbering, which they were employed to look after. When the plaintiff stepped under the rock, it fell and injured him and his own and the negligence of his co-employee was held to bar a recovery.² But to preclude a recovery, on the ground that an employee voluntarily assumed a dangerous position, he must have had actual knowledge of the danger, for if the master had been guilty of negligence which caused the injury, and the servant had no knowledge of the dangerous conditions under which he was placed, the master would be liable.³ And where the servant is inexperienced, although he saw the loosened rock and made no complaint thereof, and continued his work, if it was above his reach and he was employed and worked with skilled miners, who gave him no warning, his negligence, under such circumstances, would be for the jury.⁴

¹ *Heald v. Wallace*, 71 S. W. Rep. 80.

² *Pioneer Mining Co. v. Thomas*, 133 Ala. 279; 82 So. Rep. 15.

³ *Downey v. Gemini Mining Co.*, 24 Utah, 431; 68 Pac. Rep. 414.

⁴ *Hanley v. California &c. Co.*, 127 Cal. 232; 59 Pac. Rep. 577; 47 L. R. A. 597; *Collins v. Greenfield*, 172 Mass. 78; 51 N. E. Rep. 454; *Peerless Stone Co. v. Wrap*, 152 Ind. 27; 51 N. E. Rep. 326; *McCoy v. Westboro*, 172 Mass. 504; 53 N. E. Rep. 1064. But see, *Robinson v. Dinniny*, 96 Va. 41; 20 S. E. Rep. 442; *Knoxville Iron Co. v. Pace*, 101 Tenn. 476; 48 S. W. Rep. 232. In Illinois a miner was held negligent, who attempted to dislodge a loose piece of coal, without using "sprogs" for the purpose of preventing it from striking a prop. *Penwell v. Harvey*, 78 Ill. App. 278. See, also, *McCarthy v. Whitney Iron Works*, 48 La. Ann. 978; 20 So. Rep. 171. "A coal-mine driver was injured by an overhanging rock, past which his mule went safely. He had been in the mine three hours, and had passed the point three times, but had not

§ 264. **Same — Injury from roof of mine.**—It has been held, in Indiana, that a coal miner has the right to presume that the room where he is sent to work is in a reasonably safe condition, unless, by the exercise of ordinary care, on his part, he can discover the contrary.¹ But where, from the surrounding circumstances, the miner ought to have discovered the unsafe condition of the roof of the mine, or where, in undermining such roof, it is rendered unsafe and dangerous and, with full knowledge of such condition and the resulting danger, the employee

had his attention called to the rock. The pit boss had told him the entry was about the same height all through. The mule path at this point had been excavated about a foot. *Held*, that the fact that the mule was uninjured did not conclusively demonstrate the driver's negligence." *Hamilton v. Mendota Coal & Mining Co.* (Iowa, 1903), 94 N. W. Rep. 282. A miner who is engaged to mine coal by the ton, is negligent preventing a recovery for his injury, where he knows a rock to be loose and sits down immediately under it. *Fowler v. Coal Co.*, 16 Utah, 848; 52 Pac. Rep. 594. A miner cannot be said to be guilty of negligence, barring a recovery for injuries from falling slabs, merely because he fails to inform himself of the real condition of the roof. *Blazenic v. Iowa & Co. Coal Co.*, 102 Iowa, 706; 72 N. W. Rep. 292. The negligence of an employer's foreman in not removing a loose rock, is not excused because the injured employee, in the moment of peril, to avoid the danger, ran the wrong way and, as a result, lost his life, as the sudden emergency, excuses the lack of judgment on his part. *McMillan Marble Co. v. Black*, 89 Tenn. 118; 14 S. W. Rep. 479.

¹ *Diamond Block Coal Co. v. Cuthbertson* (Ind. App.), 67 N. E. Rep. 558. A miner is not under any duty to inspect the mine, but has a right to rely on the performance of such duty by the owner, unless the danger is obvious. *Bunker Hill & Sullivan Mining & Concentrating Co. v. Jones*, U. S. C. C. of App., Ninth Circuit, 130 Fed. Rep. 813. "In an action for injuries to a servant by material falling from the roof of a mine, where he was directed to work by defendant's representative, *held* to justify the submission of the question of defendant's negligence to the jury." *Tennessee Coal, Iron & Co. v. Garrett* (Ala.), 87 So. Rep. 355. In an action for injuries to an employee in a mine by being struck by material falling from the roof, evidence held to justify submission of defendant's negligence to the jury. *Tennessee Iron & C. Co. v. Garrett* (Ala. 1904), 87 So. Rep. 355.

continues to work and is injured, he cannot recover for the result of such injuries, by reason of his contributory negligence.¹ Where room dressers are employed, however, to keep the rooms of a coal mine safe and are also empowered to order the men when and where to work, in such rooms, a miner ordered to work in accordance with the direction of such room dresser, is entitled to assume that the master's representative has performed his duty and that the roof of the room is reasonably safe.² But if a miner, sent to remove loose slate from a track, fails to examine the roof to see if it is safe, and leaves a prop down, which he knocked out of place, his contributory negligence is held to be a good defense to an action for an injury from falling slate.³ And in a recent Tennessee case, where an experienced miner had worked all day, under an overhanging rock, which he undermined and caused to fall upon him, his contributory negligence was held to bar a recovery for his injuries.⁴ Usually, however, the question of a miner's contributory negligence, in working under a defective roof, after a request for props, is a jury question.⁵

¹ *Kansas & Texas Coal Co. v. Watson*, 52 Mo. App. 366; *Island Coal Co. v. Greenwood*, 151 Ind. 476; 50 N. E. Rep. 36; 4 Amer. Neg. Rep. 146; *Finlayson v. Utica Min. Co.*, 67 Fed. Rep. 507; 32 U. S. App. 143; 14 Cir. Ct. App. 492; *Missouri & Illinois Coal Co. v. Schwab*, 77 Ill. App. 598.

² *St. Barnard Coal Co. v. Southard*, 25 Ky. L. R. 638; 76 S. W. Rep. 167. See, also, *Ohio Valley Min. Co. v. McKinley*, 33 S. W. Rep. 186; *Ashland Coal & Iron Co. v. Wallace*, 101 Ky. 638; 42 S. W. Rep. 744.

³ *Dickinson Coal Co. v. Peach*, 32 Ind. App. 33; 69 N. E. Rep. 189.

⁴ *Heald v. Wallace*, 71 S. W. Rep. 80.

⁵ *Green v. Western Amer. Co.*, 30 Wash. 87; 70 Pac. Rep. 310. It is not necessary, under the Missouri prop statute, as construed by the Kansas City Court of Appeals, for the widow of a deceased miner, who met his death from a defective roof, to establish either that the roof was unsafe by reason of a failure to furnish props or that props had been demanded. *Weston v. Lackawana Mining Co.*, 105 Mo. App. 702. But

§ 265. **Same — Failure to furnish props.** — A failure to furnish props where required by the provisions of a given statute, may or may not, according to the holding of the particular State where the injury occurred, be excused by the contributory negligence of the miner, injured as a result of such non-compliance with the statute. As seen in a preceding section, the contributory negligence of the miner would constitute no defense, under the holding in Illinois. But in Missouri, it is held that a miner may not knowingly place himself in a dangerous place and then hold his employer responsible for the effects of so doing, and that a miner who knows that props are not furnished, cannot recover for an injury received after working with knowledge of such fact.¹ But knowledge of the failure to furnish props would not constitute negligence on the part of the plaintiff, without a knowledge of the danger resulting therefrom,² and a miner would not be held guilty of contributory negligence, barring his recovery for injuries from a failure to furnish props, unless the roof

see, *Wajtylak v. K & T. Coal Co.*, 87 S. W. Rep. 506. If a miner who knows the dangerous condition of a roof in a mine, to test it, taps it with his pick and thereby precipitates upon his head a slab from the roof, his contributory negligence will bar a recovery for such an injury. *Massie v. Peel Splint Coal Co.*, 41 W. Va. 620; 24 S. E. Rep. 644. A miner who, knowing that a roof is dangerous, helps to remove a prop therefrom and then sits down at the place where the timber was removed, is negligent. *Bunt v. Sierra Butte G. M. Co.*, 11 Saw. 178; 24 Fed. Rep. 847; 138 U. S. 483; 34 L. Ed. 1031; 11 Sup. Ct. Rep. 464. See, also, *Fowler v. Pleasant Valley Coal Co.*, 16 Utah, 848; 52 Pac. Rep. 594; *Knight v. Cooper*, 86 W. Va. 232; 14 S. E. Rep. 999. *Evans v. Chessmond*, 88 Ill. App. 615. The test of negligence in the protection of the roof of a mine is the ordinary and general course adopted in similar mines and evidence of such usage and custom is proper, in determining the question of the defendant's negligence. *Mason v. Mining Co.*, 92 Mo. App. 367.

¹ *Adams v. Kansas & Texas Coal Co.*, 83 Mo. App. 486. For Illinois case, refusing the defense, see, *Hinrod Coal Co. v. Adack*, 94 Ill. App. 1.

² *Hamman v. Central Coal & Coke Co.*, 156 Mo. 232.

was palpably unsafe without such props, or the dangers therefrom were obvious.¹ And if the injured employee had no control or right to prop the roof, but was ordered not to remove rock or slate therefrom, he would not be held guilty of negligence, as a matter of law, in failing to prop the roof, but his negligence should be submitted to the jury.²

§ 266. **Same — Loading drill hole with dynamite.** — In a recent Michigan case, an employee of a stone quarry, in attempting to load a drill hole with dynamite, started to force a stick into a hole too small to admit of its entrance. The court, after a careful consideration of all the issues in the case, held that it was not a scientific fact, that dynamite might explode, under such circumstances, so as to relieve the plaintiff from the result of the explosion, but that he was chargeable with a knowledge of the danger resulting from his acts and he was guilty of such contributory negligence, as to preclude his recovery.³ It has also been held, in Iowa, that a miner or employee in a quarry,⁴ is guilty of

¹ *Adams v. Coal Co.*, *supra*.

² *Taylor v. Star Coal Co.* (Ia.), 81 N. W. Rep. 249. A miner cannot be said to be guilty of contributory negligence in failing to saw props the proper length, when he had been promised props of the proper length by the boss. *Sugar Cr. Coal Co. v. Peterson*, 75 Ill. App. 631, reversed in 177 Ill. 324; 52 N. E. Rep. 475. A miner who sat down under a shattered rock, after having helped to remove its only support, is negligent. *Bunt v. Sierre Butte Gold Mining Co.*, 138 U. S. 488; 34 L. Ed. 1023; 11 Sup. Ct. Rep. 464. A miner whose duty it was to examine and prop a roof after a blast cannot recover for an injury from falling rock, when he had failed to do his duty in this regard. *Christner v. Cumberland Coal and C. Co.*, 146 Pa. 67; 23 Atl. Rep. 221. A coal miner who continued to work near a rock he knew needed propping but which he failed to prop, or give notice of, is guilty of negligence defeating a recovery for injuries from the falling of such rock. *Victor Coal Co. v. Muir*, 20 Colo. 320; 38 Pac. Rep. 378; 26 L. R. A. 435.

³ *Kopf v. Monroe Stone Co.*, 95 N. W. Rep. 72.

⁴ *Lanza v. Quarry Co.*, 11 Am. Neg. Rep. 209. See also, *Hendlesay v. Williams* (N. H.), 23 Atl. Rep. 365.

contributory negligence, in using a steel bar to tamp powder in a drill hole, or in an unexploded blast, and the same rule is followed in the Federal court, for the Eastern District of Missouri, where the court, in a well considered opinion by Adams, J., held that an employee in a mine, twenty-four years old, who used an iron gas pipe, with wood or clay in the end of it to tamp dynamite into a drill hole and who had experience enough to know the explosive qualities of the material and that a hard blow would explode it, was guilty of contributory negligence in tamping such powder in a manner to cause its explosion.¹ These decisions are in accordance with the weight of authority, upon this question, so far as skilled or experienced employees are concerned,² but of course this rule would not apply to inexperienced or youthful employees,³ or those not familiar with the conditions which produced the danger causing the injury.⁴

§ 267. Drilling into unexpected charge of dynamite.— Where the employee is one of experience and ordinary skill in the business of mining, since the employer is under no legal obligation of inspecting the mine to discover unexploded shots, such employee, if he drills an unexploded charge of powder, would be held guilty of such contributory negligence as to preclude a recovery by him, for

¹ *King v. Morgen*, 109 Fed. Rep. 446; 10 Am. Neg. Rep. 200. See also, *Whaley v. Coleman* (Mo. App. 1905), 88 S. W. Rep. 119.

² *Wiskie v. Granite Co.*, 5 Am. Neg. Rep. 610; 10 Am. Neg. Rep. 684; *Berea Co. v. Kraft*, 10 Mor. Min. Rep. 16; *Dunn v. McNamnee* (N. J.), 2 Am. Neg. Rep. 34; *Welch v. Grace* (Mass.), 1 Am. Neg. Rep. 614; *Hill v. Drug Co.* (Mo.), 3 Am. Neg. Rep. 229.

³ *Itner Co. v. Killan* (Neb.), 93 N. W. Rep. 951; *Fitzgerald v. Alma & Co.*, 181 N. C. 636; 42 S. E. Rep. 946.

⁴ *Chambers v. Chester*, 172 Mo. 461. An employee in a quarry, not familiar with the fact that a blow will explode dynamite, is not guilty of contributory negligence in falling to go far enough away to avoid a premature explosion, in the removal of dynamite from a drill hole, by a co-employee. *Grimaldi v. Lane*, 177 Mass. 565; 59 N. E. Rep. 451.

so doing.¹ And since the operator of a steel drill and his helper or assistant are regarded as fellow-servants, if the explosion of an unexploded charge of dynamite is due to the negligence of such helper or fellow-servant, this would also preclude a recovery by the steam drill man, or vice-versa, as his risk would be one assumed, upon entering into the employment.² Where the employee is not of sufficient experience to know the danger of drilling into unexploded shots, however, or his business was not to look for such shots or make inspections therefor, but the only issue is upon defendant's negligence in failing to find and warn such employee of an unexploded shot, it is not proper to admit evidence that proper inspections would not have disclosed such unexploded shots, as this is the issue of fact for the jury to decide, in such a case.³

§ 268. Other acts of negligence in handling explosives.— It has been held to be an act of contributory negligence, preventing a recovery by the party guilty of such a want of care, in case of a resulting injury, to light a fire, for the purpose of repairing tools, in a room where powder is stored.⁴ And on account of the well known danger of an

¹ *Livingood v. Joplin Mining and Smelting Co.*, 179 Mo. 229; 77 S. W. Rep. 1077; *Browne v. King*, 100 Fed. Rep. 561; 40 Cir. Ct. App. 545; *McMahon v. Ida Mining Co.*, 101 Wis. 102; 76 N. W. Rep. 1098.

² *Livingood v. Joplin Min. & Smelt. Co.*, *supra*; *Brown v. King*, *supra*.

³ *Holy Cross Gold Min. & Mill Co. v. O'Sullivan (Colo.)*, 60 Pac. Rep. 570. The neglect of an employee and his boss to examine a drill hole for an unexploded shot will prevent a recovery for injury from an explosion, although he acted in pursuance to an order in drilling out the hole. *Sexton v. Turner*, 16 Va. L. J. 584; 15 S. E. Rep. 862. An experienced miner cannot be expected to search the bottom of the drift to see if there were any missed shots, before starting a drill hole. *Anderson v. Daly Min. Co.*, 15 Utah, 22; 49 Pac. Rep. 126; *Consolidated Coal Co. v. Bruce*, 150 Ill. 449; 37 N. E. Rep. 912; *Ross v. Stanley*, 185 Ill. 390; 56 N. E. Rep. 1105. See, *contra*, *Kelly v. Cable Co.*, 8 Mont. 440; 20 Pac. Rep. 669.

⁴ *Downey v. Pence*, 98 Ky. 261; 32 S. W. Rep. 737.

explosion, from a jar, by those familiar with the properties of such material, it has also been held to be negligence to leave an open barrel of gunpowder near a place where a blast is set off.¹ And where the danger of striking an unexploded dynamite cartridge with a pick, was understood by an employee, who knew that such cartridges were frequently left unexploded, after the use of an electric battery, to fire blasts, a failure to use caution in approaching an unexploded hole and a resulting injury from striking a cartridge with a pick has been held to create no liability.² But the question of whether or not a miner was guilty of contributory negligence in prematurely returning upon a blast, after waiting for twenty minutes, where the evidence showed that an explosion usually occurred in three or four minutes after the fuse was lighted, was held to be a jury question, in Alabama.³

§ 269. **Same — Defects in scaffolding and platforms.**— The rule which requires an employee to use reasonable diligence to discover and inform himself as to risks and dangers surrounding him, and to conduct himself accordingly, has been held to apply to defects in scaffolds and derricks that are open to observation. In Illinois, it was held, that where there was a knot running across a plank, furnished an employee in a scaffold, which was open to observation, he was bound to take notice that the effect of such knot

¹ *Mulligan v. McAlpine*, 15 Sc. Sess. Cas., 4 Ser. 789.

² *Hutchinson v. Parker & Co.*, 89 App. Div. 133; 57 N. Y. Supp. 168.

³ *Eureka Co. v. Bass*, 81 Ala. 200; 8 So. Rep. 216. Before contributory negligence can be predicated from the fact that a miner returns too soon after a blast, to permit the gas to pass away, it must appear that he did not wait a reasonable or proper time. *Sommer v. Carbon Hill Coal Co.*, 89 Fed. Rep. 34. In Kentucky, it has been held, that a miner who knows the danger of fire coming in contact with powder and voluntarily lights a fire, in proximity to powder, is guilty of such negligence, as matter of law, as will defeat a recovery for injuries from a resulting explosion. *Downey v. Pence*, 98 Ky. 261; 82 S. W. Rep. 737.

was to weaken the plank, and a failure to take the ordinary precautions necessary to avoid an injury therefrom, was held such contributory negligence as would preclude a recovery.¹ But unless it is the peculiar duty of an injured employee to inspect and repair a derrick or scaffold, the master cannot transfer this duty to him, merely because he works on such derrick or scaffold; the employee has the right to expect a proper discharge of his duty in this regard by the master, and is not guilty of negligence in failing to inspect or test the scaffold or derrick on which he is put to work.² And the employee is not put to the trouble of either alleging or proving an inspection on his part, but is entitled to rely upon the performance of the duty, by the master, to himself inspect and test the derrick, or scaffold, before he permits his employees to work upon it.³

¹ *Armour v. Brazeau*, 191 Ill. 117; 60 N. E. Rep. 904.

² *Jarvis v. New York Marble Co.*, 55 App. Div. 272; 67 N. Y. S. 78; *Smelzel v. Iron Co.*, 116 Mich. 149; 74 N. W. Rep. 488.

³ *Consolidated Stone Co. v. Williams* (Ind. App.), 57 N. E. Rep. 558. In Kansas, it is held that an employee in a salt plant where his injury resulted from stepping upon a drip board, seven inches wide, covered with salt, as a result of which he slipped into a pan and was scalded, is guilty of such negligence as will bar a recovery by his representative. *Foster v. Kansas Salt Co.*, 60 Kan. 859; 57 Pac. Rep. 961. See also *Cook v. Bullion Beck Min. Co.*, 12 Utah, 51; 41 Pac. Rep. 557; *Carroll v. Penn. Coal Co.*, 1 Mon. 284; 15 Atl. Rep. 688. "A master who furnished a stiff-leg derrick requiring no guy rope for use by his employees in unloading stone from cars, which was complete and in good repair, and suitable for the work, is not liable for the injury of an employee by the falling of a block forming part of a guy line which had been rigged by fellow-servants of such employee for their own convenience to enable the derrick to be given a longer reach than it was intended to have, so that a car might be unloaded without being moved, such line having been put on in the absence of the master, and without his knowledge." *Maxfield v. Graveson*, 131 Fed. Rep. 841. The miners have a right to presume that a platform, subjected to the strain, caused by jarring from blasts, will stand the test to which the ordinary operations of the mine subject it. *Smelzel v. Odanah Iron Co.*, 116 Mich. 149; 74 N. W. Rep. 488. A miner who knows of a rotten plank, in a scaffold, but voluntarily uses such plank, without any sudden emergency therefor, is negligent. *Cook v. Bullion Beck Min. Co.*, 12 Utah, 51; 41 Pac. Rep. 557.

§ 270. **In connection with hoisting apparatus.** — A miner who is rightfully on a cage and is injured by the premature hoisting of the cage is not prevented from a recovery upon the ground of his contributory negligence.¹ But if he uses such cage, in violation of a rule of the employer, instead of a ladder, provided for the purpose, he cannot recover, on account of his violation of the rule, in case of a resulting injury.² If the negligence of the master caused the injury, however, instead of that of the servant, as where he failed to look for obstructions in the mine before causing the cage to be lowered therein, the mere fact that one of the employees who was injured, stood on a bar above the bucket, instead of on the bucket, would not constitute such negligence as to bar his recovery.³ And where the injury is due to a violation of a statute, as in Illinois, where the defendant failed to provide lights and the employee was injured in alighting from the cage, as a result of such failure on the employer's part, the defense of contributory negligence will not obtain.⁴

¹ *Princeton Coal Co. v. Roll* (Ind.), 66 N. E. Rep. 169.

² *Anderson v. Mikado Mining Co.*, 8 Ont. Law Rev. 581.

³ *Alaska United Gold Mining Co. v. Keating*, 116 Fed. Rep. 561.

⁴ *Odin Coal Co. v. Denman*, 185 Ill. 418; 57 N. E. Rep. 192; 84 Ill. App. 190. A miner who crosses under the shaft and is injured by a descending cage, cannot recover, although it is only his second day in the mine. *Rush v. Coal Bluff Mining Co.* (Ind.), 80 N. E. Rep. 904. In *Illinois Fuel Co. v. Parsons* (88 Ill. App. 182), the plaintiff was injured while being hoisted up the shaft, in a cage, but as his injury was due to his carrying a drill on the cage, in violation of law, he could not recover. A pit boss who failed to put catches on a cage, as required by law, was held guilty of contributory negligence, in Illinois. *Beaucam Coal Co. v. Cooper*, 12 Ill. App. 878. A miner, injured while ascending from a mine, by a drill being lowered into the mine, where he had failed to give any signal of his movements, is guilty of negligence preventing his recovery. *Snyder v. Viola Min. & Smelting Co.*, 2 Idaho, 771; 26 Pac. Rep. 127. A miner is guilty of such contributory negligence as to preclude a recovery by his representative, where he is killed by reason of the negligence of a co-employee, in starting the cage without a signal, and he

In Pennsylvania, it is held, that where a coal miner, with full knowledge of an ascending cage, full of coal, deliberately steps into the shaft, beneath such cage, without looking to see if another cage is descending, he is guilty of negligence, as a matter of law, barring a recovery for injury from being struck by the descending cage.¹

§ 271. **Same — Uncovered cogs, set-screws, and gearing.** — A further illustration of the rule laid down in

knew of the custom of his fellow-servant, in this regard. *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; 38 Pac. Rep. 596. "Where a mine owner negligently lowered men into a mine without first ascertaining that the shaft was free from obstructions, and the bucket came in contact with obstructions negligently left in the shaft by a servant, the fact that one of the men stood on a bar above the bucket, and received injuries which he would not have received had he been in the bucket, did not contribute as a proximate cause of the accident and hence was not contributory negligence." *Alaska United Gold Min. Co. v. Keating* (U. S. C. C. A., Alaska, 1902), 116 Fed. Rep. 561. "Where it appeared that a miner descending a mine shaft with his foot in the loop of a rope was injured by the rope breaking, and that ladders were furnished for the purpose of descending the shaft and were near, his injuries were due to his own negligence, and he was not relieved from it because his fellow-workmen committed the same fault." "It also appearing that the work of the miner and his fellow-servants was to remove dirt from the drifts running out from the shaft, and that a wheelbarrow was furnished and a plank on which to run it to the shaft, but instead of using the wheelbarrow the miner and his fellow-servants used a bucket attached to the rope that broke, by loading the bucket and having it hauled by the rope and windlass, and that such use of the rope weakened it by contact with the gravel and jagged stones of the mine roof, the defect in the rope was caused by the negligence of the miner and his fellow-servants." *Gribben v. Yellow Aster Mining & Milling Co.* (Cal. 1904), 16 Amer. Neg. Rep. 1. Where a cager in a coal mine is engaged in loading a car in a cage and the engineer starts the cage, without notice to him, the negligence of the engineer is the approximate cause of the injury. *Princeton Coal & Min. Co. v. Rill*, 13 Amer. Neg. Rep. 271. A cager in a coal mine who works rapidly and goes on the cage to adjust a car, instead of around it by the "traveling way," is not guilty of contributory negligence. *Princeton Coal & Min. Co. v. Rill* (Ind. 1903), 13 Amer. Neg. Rep. 271.

¹ *McDonald v. Rockhill Iron and Coal Co.*, 133 Pa. 1; 19 Atl. Rep. 797.

foregoing section, with reference to the assumption, by an employee, of a voluntary dangerous position, is the case of working around uncovered cogs and gearing, as a result of which an injury is likely to happen, at any time. In a recent Wisconsin case, the plaintiff who was employed to fire an engine, in a mine, attempted to push down the air pin, with a loose valve wheel, directly over the gearing of the engine. On closing the valve, the loose wheel slipped off the pin and his hand was caught in the gearing and he was badly injured, and it was held, by the court, that in voluntarily assuming such dangerous position, he was guilty of such contributory negligence as to bar his recovery.¹ In a Missouri case, a boy fifteen years old, who was employed to assist in the operation of an iron die, rested his hand on a cog-wheel, connected by belting with the machine. While in this position the machine was started and the cog wheel caught the plaintiff's hand and his contributory negligence was held to defeat his recovery.² A like holding was announced, in Massachusetts, where an apprentice who had had about three weeks' experience in such work, was sent to oil machinery located near the ceiling. In doing so he reached over a revolving shaft and his sleeve caught upon a set-screw and his own negligence was held to preclude his recovery.³ And a similar rule obtains in Indiana where the youth of the employee, if he has reached years of discretion, will not justify a recovery by him, for an injury from coming in contact with dangerous machinery, open to observation.⁴ And where the duty of the employee did not require him to come in contact with cog-wheels or gearing, he cannot predicate a

¹ *Upthegrove v. Jones & Adams Coal Co.*, 96 N. W. Rep. 385.

² *Richardson v. Mesker*, 171 Mo. 666; 72 S. W. Rep. 506. See, also, *McCarthy v. Mulgrew*, 107 Iowa, 76; 77 N. W. Rep. 527.

³ *Demers v. Marshall*, 59 N. E. Rep. 454.

⁴ *Morewood Co. v. Smith*, 57 N. E. Rep. 199.

right of recovery or avoid his own negligence, by a plea that the same should have been guarded.¹

§ 272. **Dangerous position — Under rising bucket.**— An employee who takes any dangerous position around a mine, in which he is apt, at any moment, to be injured, is so far oblivious to his own safety as to preclude a recovery, in case of injury while occupying this unsafe or dangerous position.² This rule is illustrated by the case of employees engaged in filling coal into a bucket, hoisted by means of a rope and an iron hook. If such employees are familiar with the use of the hook and bucket and have performed such duty for some time prior to the accident, by which they are injured, they will, as a matter of law, be precluded, on account of their contributory negligence, from recovering for an injury from the falling of the bucket from the hook, where, after filling it and ordering the engineer to hoist it out, they go to work directly under the rising

¹ *Cunningham v. Bath Iron Works*, 92 Me. 501; 53 Atl. Rep. 106; *Rock v. Orchard Mills*, 142 Mass. 522; *Hale v. Cheney*, 159 Mass. 268. "The plaintiff, an experienced bolt cutter, was injured while shifting the belt upon the bolt-cutting machine by his hand slipping from the shifting lever and coming in contact with the unprotected gearing. He had worked at this identical machine at another shop of defendant, but the gearing was then protected by a cover. Upon his complaint of the danger from the lack of a cover the foreman had promised to have it attended to as soon as he could. *Held*, that the question whether there was negligence was for the jury." *Dowd v. Erie &c. Coal Co. (N. J.)*, 16 Amer. Neg. 122. Working within a few inches of a revolving set-screw, is such negligence as will preclude a recovery, in case of a resulting injury. *Horton v. Vulcan Iron Works*, 43 N. Y. Supp. 699; 18 App. Div. 508. An employee who attempts to use a wrench on oily machinery near revolving cog-wheels is guilty of such negligence as will bar a recovery from getting his hand caught in the cogs, although acting in pursuance of an order of his master. *Gorman v. Des Moines &c. Co.*, 99 Iowa, 257; 68 N. W. Rep. 674.

² *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594; *Murphy v. City Coal Co.*, 172 Mass. 324; 52 N. E. Rep. 503; *Cunningham v. Bath Iron Works*, 92 Me. 501; 43 Atl. Rep. 106.

bucket, without looking to see if it is going up rightly, or not.¹ But if the danger is not so imminent that a reasonably prudent man would not have abandoned the work, the employee, in continuing his work, is not guilty of such contributory negligence, as will defeat his recovery.² And where the evidence of the plaintiff's negligence is conflicting and the injury results from insecure grappling hooks, in handling a large rock, in a stone quarry, the question of the plaintiff's negligence should be submitted to the jury.³

§ 273. **Injuries from ore cars.** — The same general rule that applies to other similar appliances would extend to injuries to miners from mineral cars, in use in or about the mine, and the master is liable for such injuries or the servant precluded from recovering, accordingly as the one or the other's want of care, occasions, or contributes to the injury complained of. An employee struck by a descending car, in a coal mine, at a place where there was a switch, which he neglected to have his assistant turn, is guilty of negligence, barring a recovery, for the injury,

¹ *Skapura v. National &c. Co.*, 83 App. Div. 21; 81 N. Y. Supp. 1085.

² *Riverton Coal Co. v. Shepard*, 207 Ill. 895; 69 N. E. Rep. 921.

³ *Sikes v. Missouri Granite Co.*, 92 Mo. App. 12. "A complaint in an action by a servant for personal injuries alleged that plaintiff, while working at the bottom of a shaft, was injured by the overturning of a bucket used to hoist earth, caused by the defective condition of an iron ring used with the bucket. It was alleged that the ring was cracked, and too weak to withstand the strain required of it, and that plaintiff, owing to the semidarkness, was unable to inspect the ring closely, but believed it to be sufficient. *Held*, that the complaint was not demurrable as showing that the defect in the ring was obvious, and as apparent to the plaintiff as to defendant." *Brazil Block Coal Co. v. Gibson* (Ind. 1903), 66 N. E. Rep. 882. A miner who voluntarily assumes a dangerous place is negligent unless he was ordered to assume such a dangerous place by his employer. *Cox v. Syenite Granite Co.*, 89 Mo. App. 424. An employee engaged at work at a pump, when he knows the men are raising and lowering the buckets above him, is negligent. *Lendberg v. Brotherton Iron Min. Co.*, 97 Mich. 443; 56 N. W. Rep. 846.

when he knew the noise of escaping steam would prevent his hearing the approach of the car.¹ But a conductor of a train of cars, in a mine, cannot be held negligent, as a matter of law, while being hauled out of the mine, merely because he was riding upon the front car, especially where the evidence was conflicting as to his proper position, under the circumstances.² Nor will a miner be held guilty of negligence in attempting to climb upon a moving car from the front of the car, as a result of which he is injured, where the evidence fails to show that the speed of the car, at the time, was such as to make such act dangerous.³

¹ *Woodward Iron Co. v. Jones*, 80 Ala. 128. See, also, *Beckman v. Consolidated Coal Co.*, 90 Iowa, 252; 57 N. W. Rep. 889. An employee who loads a car so heavily upon one side as to cause it to fall upon him is negligent. *St. Louis Bolt & Iron Co. v. Brennan*, 20 Ill. App. 555. "Deceased, prior to his death, was in defendant's employ, and as he saw a loaded car approaching him on one of defendant's elevated tramways deceased and another of defendant's employees stepped across the main track onto an elevated switch track, and deceased fell through an uncovered hole in the track through which surplus material was unloaded. The hole was usually covered, and at the time of the accident there was not sufficient light to see the hole without close observation. *Held*, that whether deceased's act proximately contributed to his injury was for the jury, and an instruction that, if an ordinarily prudent person would not have gone in front of such moving car as deceased did, defendant was not liable, was properly refused." *Texas Portland Cement & Lime Co. v. Lee* (Tex. Civ. App. 1904), 82 S. W. Rep. 806.

² *Cadell v. Wapello Coal Co.*, 68 Iowa, 737; 28 N. W. Rep. 56.

³ *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9; 75 Ill. App. 605; 54 N. E. Rep. 567. Where the injury from a car, due to the breaking of a cable, was owing to a latent defect, there is no liability. *Quintana v. Consolidated K. C. Smelting & Co.*, 14 Tex. Civ. App. 847; 37 S. W. Rep. 869. In an Alabama case, it is held that a miner is not, as matter of law, guilty of contributory negligence, defeating a recovery, in going up a mining slope behind tram cars, where this was the usual means of egress and ingress and there were landings, at the side of the track, and the miner was killed by a post knocked against him, by the derailed car. *Wheatley v. Zenida Coal Co.*, 26 So. Rep. 124. A mining company is not liable for an injury to an employee in riding on a defective car, in a slope of the mine, in violation of the Pennsylvania law. *Voshelskey v.*

§ 274. **Striking match when mine contains gas.**— Under the test that a reasonably prudent person is supposed to observe the same care to protect himself from dangers, that he would be warranted in expecting from another,¹ a miner who ought to know the presence of gas, or fire damp, in the mine where he is at work, and who lights a match without observing his safety lamp, is held guilty of such contributory negligence as to prevent a recovery for an injury from a resulting gas explosion.² An experienced oil miner is also held to be so negligent as to bar a recovery by his representative, where he is killed by an explosion of inflammable gas, escaping from an oil well, which he could hear escaping, but which he approached with a lighted lantern.³ But if the employee had no notice of the presence of gas or other dangerous inflammable substances, the taking a light, or striking a match in proximity to such gas would not bar a recovery for a resulting injury, as the rule is general that to defeat a recovery the employee must have known of the danger.⁴ And whether or not the striking of a match, by an employee, at a place where there is dangerous gas, will bar a recovery by him, for an injury from an explosion, will

Hillside Coal & Iron Co., 47 N. Y. Sup. 886; 21 App. Div. 168. A boy engaged to block the wheels of cars, in a mine, cannot be said to be negligent in running along the side of a car, in an attempt to block the wheels, as a result of which he is injured at a narrow place in the drift. *McNamara v. Logen* (Ala.), 14 So. Rep. 175. A miner is guilty of negligence who gets under a car standing on an incline, to remove loose mineral from the track, when a rake was provided for the purpose and he was directed to use it. *Morgan v. Hudson River Iron Co.*, 133 N. Y. 666; 45 N. Y. Sup. 112; 31 N. E. Rep. 284.

¹ *Priestly v. Fowler*, 3 M. & W. 1; *Paterson v. Wallace*, 28 E. L. & E. 48; *Ashland Coal Co. v. Wallace*, 101 Ky. 626; 42 S. W. Rep. 744.

² *Sommers v. Carbon Hill Coal Co.*, 91 Fed. Rep. 337.

³ *McClafferty v. Fisher* (Pa.), 1 Cent. Rep. 571.

⁴ *Magnum v. Bullion Block Mine Co.*, 15 Utah, 534; 50 Pac. Rep. 834; *Hammon v. Coal & Coke Co.*, 156 Mo. 282.

depend largely upon the facts and circumstances of each particular case, and if the knowledge of the employee as to the presence of the gas is a question on which the evidence is conflicting, the issue should be submitted to the jury.¹

§ 275. **Permitting clothing to catch on machinery.** — There has to be a limitation drawn, somewhere along the line, with reference to the employer's liability for injuries to the servant, and while this boundary line as to what is and what is not the proper limit of the master's liability, has, of late years, been so extended that in most of the personal injury actions the rule is made so flexible as to hold him liable, there are certain acts upon the part of the employee that, in themselves, are held to show such carelessness for his own safety, as to prevent a recovery, in case of injury, and one of these specific acts of negligence is to permit one's clothing to catch on machinery, as a result of which an injury is sustained.² This rule is in accordance with the doctrine that an employer's liability

¹ *Rush v. Gas &c. Co.*, 65 N. J. L. 399; 47 Atl. Rep. 504.

² *Labatt Mas. & Serv.*, Sec. 382a. p. 827, note. "It is generally regarded as such an act of contributory negligence, for an employee to wear clothing of such a character as would be liable to catch on open and exposed machinery, as would prevent a recovery by him, in case of injury, and this would be particularly true where the employee negligently handled clothing in close proximity to revolving machinery." *White Mines & Min. Inj.*, Sec. 459, p. 606; *Lemoine v. Aldrich* (Mass.), 8 Amer. Neg. Rep. 637; *Hempke v. Thilman* (Wis.), 8 Amer. Neg. Rep. 172; *Horton v. Vulcan Iron Works*, 43 N. Y. Supp. 699; 13 App Div. 508; *Hurst v. Burnside*, 12 Or. 520; 8 Pac. Rep. 888; *Russell v. Tillotson*, 140 Mass. 201; 4 N. E. Rep. 281; *Middaugh v. Mitchell*, 120 Mich. 581; 79 N. W. Rep. 806; *Sakol v. Richel*, 113 Mich. 476; 71 N. W. Rep. 833; *Denvers v. Marshall*, 178 Mass. 9; 59 N. E. Rep. 454; *Graff v. Imp. Mill Co.*, 58 Minn. 333; 59 N. W. Rep. 1049; *Beck v. Firmnick Co.*, 82 Iowa, 286; 48 N. W. Rep. 81; *Glassheim v. New York &c. Co.*, 84 N. Y. Supp. 69; *Anderson v. Nelson &c. Co.*, 67 Minn. 79; 69 N. W. Rep. 630; *George v. St. Louis &c. Co.*, 159 Mo. 333; 59 S. W. Rep. 1097.

does not extend to injuries from the employee voluntarily taking a known dangerous position, as a result of which he is likely to sustain injury. The presence of dangerous machinery is usually open to the sense of vision and quite frequently can also be distinctly heard. The danger from coming in contact therewith is apparent and an employee who, with such knowledge, increases the danger of his position by letting his clothing catch on machinery is certainly derelict in his duty to use common, ordinary prudence to protect himself from injury. In a recent New York case, an independent contractor was working upon a scaffold, near a revolving shaft, and set screw. He was chargeable with full knowledge of the danger therefrom and was held guilty of negligence, preventing a recovery for injuries from having his clothing caught by the set screw, as a result of which he was whirled around the shaft.¹ But if, for any reason, there could be a question of the ability of the employee to know the proximity of such machinery, or if he was obeying an order of the master at the time of his injury, then, where the evidence would be conflicting as to his want of care, the issue, under proper instructions, should be submitted to the jury.²

§ 276. **Negligence in adjustment of belt.** — In the adjustment of belts, by those employees who have sufficient experience to understand the proper manner of handling the machinery, since the exact conditions are not only apparent to the employee but the very act to be performed brings him in contact with the machinery, he will be held negligent if he does not adopt the method attendant with some regard for his own safety. Where there is a belt

¹ *Halley v. Vulcan Iron Works*, 43 N. Y. Supp. 699.

² *Hurst v. Burnside*, 12 Or. 520; 8 Pac. Rep. 888; *Joraszeski v. Mfg. Co.* (Minn.), 8 Amer. Neg. Rep. 441; *Dempsey v. Sawyer* (N. Y.), 10 Amer. Neg. Rep. 285; *White Mines & Min. Inj.*, Sec. 459, p. 606.

shifter provided, an employee is negligent who uses his hand, instead of the belt shifter.¹ If a stick is the safer method to use to shift a belt than the hand and an employee with this knowledge, uses his hand, instead of a stick, he cannot recover for resulting injuries.² Where an employee is injured, in shifting a belt, by its catching on a collar of the shaft and the evidence shows that the belt could have been safely taken on the opposite side, his negligence will bar a recovery for an injury therefrom.³ And an employee who fails to use a substitute for a belt shifter and without applying a clutch or hand lever, in the adjustment of a set screw on a horizontal shaft and, as a result, is injured by the turning of the shaft, caused by the friction of the belt, which shifts from a slack to a fast pulley, is guilty of such negligence as will prevent a recovery for such injury.⁴

§ 277. **Injury from defective ladder.** — Substantially the same rule of liability obtains in the case of an injury from a defective or dangerous ladder, that applies to a like injury, in the use of a scaffold or platform.⁵ If the injured employee constructed the ladder himself and selected the material from which it was made, or placed it in an insecure or dangerous place, as a result of which he was injured, he is held guilty of such negligence as will preclude a recovery.⁶ But if the material and construction of the ladder was superintended by the master himself and the place where it was used, when the injury occurred, was where he was directed to use it, then he could not be held

¹ *Fleming v. Buswell*, 62 N. Y. Sup. 1187; 48 App. Div. 635.

² *Wetjen v. Southern White Lead Co.*, 5 Mo. App. 598; *Willingdale v. Rockdale Oil & Co.*, 101 Ga. 718; 29 S. E. Rep. 30.

³ *Cushman v. Cushman*, 179 Mass. 601; 61 N. E. Rep. 262.

⁴ *Carriere v. McWilliams*, 104 La. 678; 29 So. Rep. 338.

⁵ *White Mines & Min. Inj.*, Sec. 465, p. 615 and cases cited.

⁶ *Ante, idem.*

guilty of negligence in using the ladder in the performance of his duty.¹ An owner, however, is not responsible for an injury from a ladder being thrown out of adjustment by the act of the injured employee, or that of his fellow-servant,² and some of the cases have distinguished between an injury from a defective ladder, and a scaffold or platform, which is to be changed, or adjusted, as the work progresses.³ It has been held, in Utah, that a miner could not be held guilty of contributory negligence, as a matter of law, in going down a ladder leading into the mine, with his back to the ladder, where the position of the ladder is not sufficiently vertical to make this means of descent dangerous.⁴

§ 278. **Miner falling into pit of mine.** — The rule is quite general that if an employee places himself in an obviously dangerous position, or in a position which, in the exercise of reasonable care for his own safety, would be obviously dangerous to him, then it is negligence on his

¹ *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. L. 647; 44 Atl. Rep. 762; 7 Amer. Neg. Rep. 113; *Kender v. Woolaston*, 32 N. Y. Supp. 742. A miner who steps from ladder into hole in derrick, left by direction of foreman, is not guilty of contributory negligence, if he had no knowledge of the hole. *Downey v. Gemini Mining Co.* (Utah, 1902), 68 Pac. Rep. 414. Where an employee was injured from an insecure ladder, from one side of which another employee had removed waste that supported it and where from the evidence it was questionable if the employee who occasioned the injury was a fellow-servant, it was proper to submit the issue to the jury. *Dryburg v. Mercur G. M. & M. Co.* (Utah), 5 Amer. Neg. Rep. 258.

² *Olsen v. Nixon*, 61 N. J. L. 271; *Dryburg v. Mercur Gold & Silver Min. & Smelting Co.* (Utah), 5 Amer. Neg. Rep. 253.

³ *Maher v. McGrath*, 58 N. J. L. 469. In Wisconsin, it is held that a master is not guilty of negligence, as a matter of law, in failing to spike a ladder at the bottom, to prevent its slipping. *Borden v. Daisy & Co. Mill*, 98 Wis. 407; 74 N. W. Rep. 91. But see *Marsh v. Chickering*, 101 N. Y. 396. See, also, *Rlethnay v. Suite*, 120 Ind. 314.

⁴ *Reese v. Morgen Lit. Min. Co.*, 15 Utah, 458; 49 Pac. Rep. 824.

part to have so placed himself in such position where he is likely to incur an injury and he cannot recover for a resulting injury.¹ Under this rule, it is held that where a miner, finding that the guide, who had been accustomed to conduct him to his place of work, had gone on before, attempted to reach his destination, along a narrow path that was so dark that he could not see to walk, and as result fell into a pit alongside the path and was injured, he was guilty of such contributory negligence as to bar a recovery by him, in heedlessly assuming the danger, which he has no means of seeing or apprehending.²

§ 279. **Disobedience of rules constitutes.**— The master has a duty to perform in order to further the safety of his employees, in prescribing and promulgating reasonable rules for the performance of their respective duties³ and where, in the observance of this duty he establishes such rules, he is entitled to a compliance therewith by his employees. If an employee elects to perform his duty by a method known to him to be dangerous, in violation of the direction of the master, or contrary to his established rules, the master will not be liable for an injury to the servant, whether the danger is obvious or not, but the contributory negligence of the servant, in thus violating a rule, intended

¹ *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594. Upon the same reason for the master's non-liability in this kind of a case, see *Fulger v. Boothe*, 117 Mo. 475.

² *Smith v. Thomas Iron Co.* (N. J.), 54 Atl. Rep. 562. And in this connection, see also, *Shippey v. Grand Rapids Co.* (Mich.), 83 N. W. Rep. 284. Where a servant knows that he has gotten off of a well-beaten path and nevertheless goes ahead and falls into a mine, no recovery can be had. *McShane v. Baxter*, 7 Times L. R. 58. *McCann v. Atlantic Mills*, 20 R. I. 566; 40 Atl. Rep. 500. One who knows of a pit and walks into it is negligent, regardless of the question of the sufficiency of light. *McDonnell v. Illinois &c. Co.*, 105 Iowa, 534; 75 N. W. Rep. 836.

³ See Chapter, *Injuries from Failure to Establish Rules*.

to protect him, will preclude his recovery.¹ In some States the rule is said to be relaxed, where the disobedience of the rule is in accordance with the instruction of the master's representative;² but in others, a recovery is precluded even in case the vice-principal orders a violation of the rule.³ But to prevent a recovery, upon the ground of contributory negligence, the violation of the rule or order, must contribute to cause the injury complained of.⁴

¹ *Whitson v. Wrenn* (N. C.), 46 S. E. Rep. 17. For injury from using cage, instead of ladder, in violation of rule. *Anderson v. Mikado Mining Co.*, 8 Ont. Law. Rep. 581.

² *Carson v. Southern &c. Co.*, 68 S. C. 55; 46 S. E. Rep. 525; 194 U. S. 136; 48 L. C. P. Ed. 907; *Kansas City &c. Co. v. Kier*, 41 Kan. 661; 21 Pac. Rep. 770; 13 Amer. St. Rep. 311; *Hurlburt v. Ry. Co.*, 130 Mo. 657; 31 S. W. Rep. 1051.

³ *Keenan v. R. R. Co.*, 145 N. Y. 190; 39 N. E. Rep. 711; 45 Amer. St. Rep. 604; *East Tenn. &c. Co. v. Smith*, 89 Tenn. 114; 14 S. W. Rep. 1077.

⁴ *Horan v. R. R. Co.*, 89 Iowa, 328; 56 N. W. Rep. 507; *Fickett v. Fiber Co.*, 91 Me. 268; 39 Atl. Rep. 996; *Ford v. R. R. Co.*, 110 Mass. 240; 14 Amer. Rep. 598; *Railroad v. Thompson*, 101 Ga. 26; 28 S. E. Rep. 429; *Tullis v. R. R. Co.*, 105 Fed. Rep. 554; 44 C. C. A. 597. The violation of a rule was held to preclude a recovery by the representative of deceased, in Illinois, in *Mendota L. & H. Co. v. Lafferty*, 92 Ill App. 74. One shovelling coal from a pile, when the top is frozen over, and excavates the bottom, without breaking the frozen crust, in violation of orders, cannot recover, for a resulting injury. *Primeau v. Merchants &c. Co.*, Rap. Jud. Que. 19 S. C. 62. The proposition that the violation of the rule must have occasioned the injury is adhered to in the well-considered case of *Helfenstein v. Medart* (136 Mo. 595; 36 S. W. Rep. 863), where the rule which was violated prevented employees from changing their clothes before quitting time. The plaintiff's decedent had violated this rule and was killed by the bursting of a grindstone, at an excessive rate of speed. The violation of the rule was held not to preclude a recovery. See same case, 136 Mo. 619; 37 S. W. Rep. 829; *idem*, 38 S. W. Rep. 294. See, also, *Taylor v. Star Coal Co.*, 110 Iowa, 40; 81 N. W. Rep. 249; *Gross v. Miller*, 93 Iowa, 72; 61 N. W. Rep. 385; 26 L. R. A. 605. Violation of master's rule was held to be contributory negligence in the following cases; *Lendberg v. Brotherton Iron Min. Co.*, 97 Mich. 443; 56 N. W. Rep. 846; *O'Brien v. Staples Coal Co.*, 156 Mass. 435; 43 N. E. Rep. 181; *Campbell v. Colderbonk Steel & Coal Co.*, 25 Sc. Sess. Cas., 4 Ser. 753. And violation of the law has been held to prevent a recovery in the following cases: *Consolidated Coal & Min.*

§ 280. **Selecting more dangerous way to perform duty.** — An employee who has the choice of two or more ways of doing a given piece of work the one safe and the other dangerous, is under a duty both to himself and his employer, of selecting the safer way to perform such duty. And if, instead of selecting the safer way of doing his work, he proceeds in the manner attendant with the greater risk and, as a result, is injured, if he knows or ought to have known of the safer way to perform his duty, he cannot recover from his employer for injuries thus sustained, for his conduct in thus selecting the more dangerous way to perform his duty, would be held negligence, even though it would not amount to actual rashness on his part.¹

Co. v. Floyd, 51 Ohio St. 542; 38 N. E. Rep. 610; 25 L. R. A. 848; *Wallace v. Connors*, 38 Ga. 199; 95 Amer. Dec. 885; *Voshefskey v. Hillside Coal & Iron Co.*, 47 N. Y. Supp. 886; 21 App. Div. 168. A miner who violates a rule in working when there are no timbers for props cannot recover. *Harvey v. Glasgow Iron Co.*, 25 Sc. Sess. Cas., 4 Ser. 903. Nor can one who ascends the shaft contrary to orders. *Highow v. Wright*, 37 L. T. (N. S.) 187; 10 Mor. Min. Rep. 24.

¹ *Central &c. Co. v. Mosley*, 112 Ga. 914; 33 S. E. Rep. 350; *Lehman v. Bagley*, 82 Ill. App. 197; *Penwell v. Harvey*, 78 Ill. App. 278; *Walker v. Atlanta &c. Co.*, 103 Ga. 820; 30 S. E. Rep. 503; 4 Amer. Neg. Rep. 26. But, in Florida, it is held, that a servant is not negligent, as a matter of law, because he adopts a method which is more hazardous than other available methods. *Florida &c. Co. v. Mooney*, 40 Fla. 17; 24 So. Rep. 148. "In the erection of a simple structure a servant may adopt any plan which is customary, where the master does not devise a plan." *Riverside Mills v. Jones* (Ga. 1904), 48 S. E. Rep. 700. Where an employee has the power to adopt his own methods of doing work, and he wantonly, knowing and appreciating the dangers of both, selects of the two ways the more dangerous, he does so at his peril, and cannot recover for any injury resulting from such relation. *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594. "Plaintiff was employed to fire an engine connected with a coal hoist, a part of his duties being to keep the boiler filled with water. On the occasion of his injury he attempted to fill the boiler with the injectors, but, finding that they would not work, he took a loose valve wheel, about three inches in diameter, went to the front of the engine, and placed the loose wheel on a cold air valve pin, which was located just over a system

§ 281. **Frequenting unused portions of mine.**—As the liability of the employer, in all cases of negligence, depends, primarily, upon the breach of a duty owed to the employee, since the duty to provide a reasonably safe place to work, in case of a mine employer, only applies to the place where he has a right to expect his employees to work, an injury received at some other portion of the mine, to which an employee has gone, for private purposes of his own, or not in obedience to a request or order of the employer, is one for which the employee could not recover, as the master owes him no duty to keep such a place in a reasonably safe condition. Accordingly, in Missouri, where a coal miner, affected by bad air, abandoned his work and walked down an entryway to the first finished cross-cut, to obtain a supply of fresh air, it was held that he could not recover for an injury received while using such cross-cut as a passage way, as he knew that it was not designed for that purpose, but was made to facilitate

of cog-wheels connected with the hoist, for the purpose of forcing air into the boiler in order to fill the same by suction. On closing the valve the loose wheel slipped off the pin, and plaintiff's hand was caught in the gearing and injured. *Held*, that the loose wheel, though small, was sufficient from its weight, to bear plaintiff's hand downward, while taking it off the pin, and that plaintiff's failure to exercise ordinary care to resist such downward tendency constituted contributory negligence barring a recovery." *Upthegrove v. Jones & Adams Coal Co.* (Wis. 1903), 96 N. W. Rep. 885. Illustrative of the rule that a servant is negligent who fails to use the safer way known to him of performing his duties are the following cases, holding that an employee is negligent who adjusts a belt, on a revolving shaft, with his hand, instead of a belt shifter or stick. *Fleming v. Buswell*, 48 App. Div. 635; 62 N. Y. Supp. 1137; *Cushman v. Cushman*, 179 Mass. 601; 61 N. E. Rep. 262; *Wetzen v. White Lead Co.*, 5 Mo. App. 598; *Willingham v. Rockdale Oil &c. Co.*, 101 Ga. 713; 29 S. E. Rep. 80; *Corricere v. McWilliams*, 104 La. 678; 29 So. Rep. 838. That there was another method, which a very timid or cautious person might have adopted, as a safer way to do the work, is not conclusive of negligence on the part of an injured employee. *Taylor v. Felsing*, 164 Ill. 331; 45 N. E. Rep. 161; 63 Ill. App. 624.

the circulation of air, in the mine.¹ But if the employee is ordered to another part of the mine or is injured at a place where he had a lawful right to be, in the proper discharge of his duties toward his employer, the latter's duty as to the place of work, would attach to such a place,² and, in Utah, it has been held that an employee is not guilty of contributory negligence as a matter of law, in leaving his work and going to another portion of the mine, on hearing the noise of a cave-in, in order to ascertain its character and extent.³

¹ *Lenk v. Kansas & Texas Coal Co.*, 80 Mo. App. 874.

² *White Mines & Min. Rem.*, Sec. 448, p. 598 and cases cited.

³ *Frank v. Bullion Beck & Co. Min. Co.*, 19 Utah, 35; 56 Pac. Rep. 419; 5 Amer. Neg. Rep. 738. "In an action against a mine owner for injuries to a miner alleged to have been caused by failure of defendant to keep the roadway along which plaintiff was required to drive a car in a safe condition, and also in requiring plaintiff to drive a vicious mule, evidence held sufficient to support a finding that plaintiff was not guilty of contributory negligence." Judgment, 112 Ill. App. 452, affirmed, *Henrietta Coal Co. v. Campbell*, 71 N. E. Rep. 863; 211 Ill. 216. "Where a servant who was paid by the hour was injured through the negligence of the master while eating his lunch at the noon hour, a contention that he was not at the time of the injury engaged in the work or business of the master was without merit." Judgment (1901) 96 Ill. App. 315, affirmed, *Heldmaier v. Cobbs*, 62 N. E. Rep. 853; 195 Ill. 172. A miner who was injured by the fall of a roof at a point where he should not have been was held negligent, in *Colorado Coal & Co. v. Carpita*, 6 Colo. App. 248; 40 Pac. Rep. 248. And see, also, *Boemer v. Lead Co.*, 69 Mo. App. 601. And a miner was also held to be negligent in lingering to talk at a place where he knew there were dangerous gases, which exploded. *Morgen v. Carbon Hill Coal Co.*, 6 Wash. 577; 34 Pac. Rep. 152. A miner who is not at work, but is on his way to the employer's office to draw his wages, cannot recover for an injury from a projecting rock, where, when injured, he was riding a brake boom, through a narrow, dark tunnel. *Richardson v. Carbon Hill Coal Co.*, 6 Wash. 52; 32 Pac. Rep. 1012; 20 L. R. A. 838. A miner, who, in passing from an entry to the surface, steps under a place he knows to be unsafe, cannot recover for a resulting injury from falling rock. *Colo. Coal & Iron Co. v. Carpita* (Colo. App.), 40 Pac. Rep. 248.

§ 282. **Acts in emergencies.** — The law so far recognizes the frailty of human nature as to excuse those placed under the strain of a great and sudden danger, from the temporary lapse of judgment or discretion which would have been calculated to lead them to pursue the safest possible course open to them, under the circumstances. Accordingly, where an employee, in leaning over a belt in a mining plant, was suddenly placed in great and sudden danger by an order to start the mill, without giving the customary warning, and he thereupon gave a wrong order to “back up,” which increased his danger, it was held that this was not such contributory negligence, under the circumstances, as to preclude his recovery.¹

§ 283. **Youthful and inexperienced employees.** — The same rule would not obtain, so far as the contributory negligence of the employee is concerned, in the case of

¹ *Mathews v. Daly West Mining Co.* (Utah), 75 Pac. Rep. 722. In his recent excellent work upon Master and Servant, Mr. Labatt makes this observation as to the absence of an emergency: “The fact that at the time the injury was received, an emergency existed which demanded unusually prompt action, is, like the absence of necessity, often mentioned by the courts as a subsidiary ground for declining to allow the servant to recover.” *Labatt Mast. and Ser.*, Sec. 358, p. 927, citing *Cook v. Bullion Beck & Co. Mining Co.*, 12 Utah, 51; 41 Pac. Rep. 557. But if there is an emergency a servant is not chargeable with negligence because he failed to select the best means of escape. *Labatt Mast. and Ser.* 358, p. 930; *Wesley City Coal Co. v. Hesler*, 84 Ill. 126; *Silver Cord Mining Co. v. McDonald*, 14 Colo. 191; 28 Pac. Rep. 346; *Dickson v. Omaha & Co.*, 124 Mo. 140; 27 S. W. Rep. 476; 25 L. R. A. 320. One whose negligence gave his employee cause for alarm, cannot, because of an absence of cool presence of mind, on the part of the person alarmed avoid liability. *Silver Cord Combination Mining Co. v. McDonald* (Colo.) 28 Pac. Rep. 346. When exclusive attention, rapidity and promptness are demanded of an employee, the fact that he fails to recall, for the instant, previous instructions, which, if remembered, would have enabled him to avoid the danger, will not, on account of the emergency, be such negligence as to bar a recovery. *St. L., I. M. & S. Co. v. Higgins* 53 Ark. 458; 14 S. W. Rep. 658.

youthful or inexperienced employees and adults of experience, for acts which the latter might readily know to be dangerous, the former might have no knowledge about at all. The law, therefore, will not deny a youthful or inexperienced employee recovery, on the ground of his contributory negligence, unless the danger was so manifest and glaring that it must have been known and appreciated by one of his age and experience.¹ Where a statute prohibits the employment in a given calling, of children of less than a certain age, this is a legislative determination, in effect, that a child of less than the statutory age does not possess the judgment and discretion sufficient to charge him with contributory negligence in the performance of his duties.² And although an infant or inexperienced employee is over the statutory age, if it is a matter of doubt, under the evidence, if he had sufficient understanding or experience to appreciate the danger to which he was exposed, it is usually a question for the jury to determine.³

§ 284. **Orders and assurances of safety.** — The rule that requires an employee to look out for dangers and dis-

¹ *Itner Brick Co. v. Killian* (Neb.), 93 N. W. Rep. 951.

² *Marine v. Lahmaler*, 173 N. Y. 530; 66 N. E. Rep. 572.

³ *Fitzgerald v. Alma & Co.*, 131 N. C. 636; 42 S. E. Rep. 946. In Alabama it is held that a child between the age of seven and fourteen years is incapable of exercising judgment and discretion and is therefore incapable of contributory negligence. *Tutweller Coal, Coke & Iron Co. v. Enslen*, 129 Ala. 336; 30 So. Rep. 600. But the mere youth of a miner will not avoid the charge of his negligence, where he ascended from the mine without signaling and was struck by a drill being lowered. *Snyder v. Viola Mine and Smelting Co.*, 2 Idaho, 771; 26 Pac. Rep. 127. A boy's capacity is the measure of his responsibility and if he cannot foresee and avoid the danger, negligence cannot be imputed to him, as a result of such failure. *Strawbridge v. Bradford*, 128 Pa. 200; 24 W. N. C. 536; 18 Atl. Rep. 346. A boy of fifteen years cannot be said to be negligent in obeying an order to run and throw away a lighted stick of dynamite, as a result of which an explosion occurred. *Orman v. Manix*, 17 Colo. 564; 30 Pac. Rep. 1037; 17 L. R. A. 602; 31 Amer. St. Rep. 340.

cover all such as are incident to his surroundings, that he could discover by the exercise of ordinary care, does not apply when the employee in question is acting under orders or assurances of the master, or his representative, for, in such case, he has the right to assume that his surroundings are safe. This proposition was recently announced, in Missouri, as to an employee of qualified experience, who was ordered to drill a hole directly over a loose slab of rock, that showed evidence of being dangerous.¹ In Colorado, the same doctrine was applied to an employee's representative, where he was killed while acting under assurances of the safety of a timber, or stull, which fell and killed him,² and the same rule was recognized, in California, as to an inexperienced employee, injured by the caving in of a tunnel, in a mine, where there was an assurance of safety, by the employer, and he had hidden the danger, by boards preventing an examination of the sides of the tunnel.³ But where the employee has equal or superior information about the defects or dangers, than the master himself has, an order or assurance of the employer, or his representative, will not protect him from the result of knowingly taking a dangerous place. So, where the plaintiff in obeying a negligent order to place a belt on a rapidly revolving shaft, had as full knowledge as the superintendent of the danger and, in obeying the order, was injured, his contributory negligence was held to bar a recovery by him.⁴ And a promise by the master, or a vice-principal, to make the place of work reasonably safe, will not relieve the employee of the duty of using reasonable care to avoid an injury, and if, notwithstanding such a promise, he fail

¹ *Carter v. Baldwin* (Mo. App. 1904), 81 S. W. Rep. 204.

² *Carleton Mill & Mining Co. v. Ryan*, 29 Colo. 401; 69 Pac. Rep. 279.

³ *Swensen v. Bender*, 114 Fed. Rep. 1; 51 C. C. A. 627.

⁴ *Coosa Co. v. Williams*, 133 Ala. 606; 32 So. Rep. 232.

to use such care and caution as an ordinarily prudent person would use, under similar circumstances, he cannot recover.¹

¹ *Miller v. Bullion Beck & Co. Mining Co.*, 18 Utah, 858; 55 Pac. Rep. 58. "Where, in an action for injuries to a servant by the collapse of certain coal pockets erected on defendant's premises, under which plaintiff was working, there was evidence that defendant had received at least two warnings before the accident that there was some defect in the plan which rendered it dangerous to load the pockets to their capacity, and, notwithstanding this, plaintiff was directed to work under the same with nothing but a beam placed under them to support the weight, which proved ineffectual, whether defendant was guilty of negligence was for the jury." *O'Donnell v. Welz & Zerweck* (N. Y. Sup. 1904), 89 N. Y. S. 959.

CHAPTER XIII.

FELLOW-SERVANTS IN MINES.

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309. Employees using same scaffold fellow-servants.
310. "Timber man" and miner.
311. Statutory "fire boss" and miners.
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313. Same — "Crusher feeder" and miner.
314. Track layers and miners.
315. Engineer and miner.
316. Tramway operator and miners fellow-servants.
317. "Tub hustlers" fellow-servants.
318. "Trimmers" and miners fellow-servants.
319. "Driver boy" and miners fellow-servants.
320. Miner and employee on surface, fellow-servants.
321. Quarry laborer and operator of cars, not fellow-servants.
322. "Powder-man" and miners fellow-servants.
323. Substitute for fellow-servant is also fellow-servant.

§ 285. **Conflict of decisions regarding.** — There is perhaps no greater diversity of opinion in regard to any other doctrine known to the law, than that which obtains in the different State and Federal courts, relative to the doctrine of fellow-servants in mines. The conflict in the authorities upon this question is not alone confined to the question of who are and who are not fellow-servants of an injured employee, in a mine, but the means or method of determining the question differs in the different States, as well as the responsibility of the master for different acts or orders of those held to be within the fellow-servant rule, and in many of the mining States conflicting decisions obtain upon these questions, by the different State and Federal courts of the same State,¹ and the question is oftentimes regarded from such diametrically opposite views and the resulting liability of the master discussed from so many different phases, that it is impossible to reconcile the decisions upon the question. The present chapter will therefore be devoted principally to a presentation of the holdings of the different States, as the author has been able to gather the different fragments of the law therefrom, without a discussion of the underlying reasons of the courts for the opposite views entertained upon the subject.

§ 286. **Doctrine of common law origin.** — The doctrine that the master is not liable for the negligence of fellow-

¹ A mere reference to one opinion in Missouri, where the different decisions are arrayed upon the department doctrine, is sufficient to sustain the text and show the necessity for a general fellow-servant law, as well as a general divorce law, in the different States of the United States. See *Grattis v. K. C., P. & G. Co.* (153 Mo., p. 395), where Judge Marshall observed: "The result is, contrary judgments, upon the same facts; an irreconcilable contrariety of opinion, with a natural and to be expected confusion in the law, with no better or more satisfactory results to either the master or servants, than were attained before the doctrine was announced."

servants with an injured employee, for the result of an injury, is of common-law origin¹ and arises as a portion of the implied contract of assumption of risk, which obtained at common-law, whereby the employee was held, as matter of law, to assume certain risks, growing out of and incidental to the contract of employment. Among the risks that an employee was thus held to assume in law and for which the employer was not liable to respond in damages was that of injury from the negligence of such employee's fellow-servants.² It is doubted by recent respectable authority³ whether the master's non-liability for the acts of his servant's co-employees is of common law origin or not, but the evidence of an old case,⁴ that "The law must have been the same, long before it was enunciated in this court in the case of *Priestly v. Fowler*" (1837, 3 M. & W. 1)—the first reported case upon the subject, where the doctrine was applied—is certainly sufficient evidence of the application of the doctrine as a portion of the common law of England.⁵

¹ "The fellow-servant law is a common-law doctrine." *Rosemond v. Southern Ry.*, 44 S. E. Rep. 574; 66 S. C. 91. "The common-law doctrine as to the nonliability of employers to an employee for the negligence of a fellow-servant, is not in force in the republic of Mexico." *Mexican Cent. Co. v. Sprague*, 114 Fed. Rep. 544. *Waddell v. Simpson*, 112 Pa. St. 557; 4 Atl. Rep. 725; *Grattis v. K. C., P. & G. Co.*, 153 Mo., p. 394; *Cooley Torts* (2 ed.), p. 637.

² *Priestly v. Fowler*, 3 M. & W. 1; 7 L. J. Exch. (N. S.) 42.

³ *Labatt Mas. & Serv.*, Sec. 470, p. 1305.

⁴ *Vose v. Lancashire &c. Co.* (1858), 2 Hurist. & N. 728; 27 L. J. Exch. (N. S.) 249.

⁵ It is remarked of the doctrine, in *Waddell v. Simonson* (112 Pa. St. 567), that it is "a principle as old as the common-law." See, also, *Grattis v. K. C. P. & G. Co.*, 153 Mo., p. 394. Mr. Labatt, in his recent excellent work on Master and Servant, traces what he is pleased to call the "evolution" of the doctrine, since it was originally applied, but upon this question it may be well doubted if the modern tendency is a progression or a retrogression, both as regards the rights of the servant and the liability of the master. "The old doctrine has been relaxed, modified, distinguished and pared down, and with the characteristic ingenuity and inventiveness of the age, distinctions have been drawn, the first

§ 287. **How status of employee is determined.** — The definition of a fellow-servant and vice-principal is a matter for the court to decide, as one of law, and the jury should be told, in proper instructions, what it takes to constitute one a vice-principal or a fellow-servant with the injured servant.¹ In many jurisdictions the determination of the question of whether, under the facts of each case, the injured employee and his co-servant, responsible for his injury, occupied the relation of fellow-servants or vice-principals, is also held to be a question of law for the court to decide. This is the rule in the United States Supreme Court,² and it seems the more accurate, for a trained legal mind can usually decide such mixed questions of law and fact better than a trial jury, who are prone to regard such issues from a wrong standpoint. And besides, the proper determination of this issue often settles the lawsuit and in passing upon a demurrer to the evidence, or determining the defendant's right to a peremptory instruction, it would be proper for the court to decide the question of the legal status of the negligent servant, in ascertaining the plaintiff's right to submit his cause to the jury. This rule is also adopted in Pennsylvania³ and

relation has been extended many degrees and the original classification has been many times subdivided, with the result that much contrariety of opinion exists and the whole matter is unsettled and left in an unsatisfactory state. By some this has been called the 'evolution of the law' from its original harshness to a more humane condition." Marshall, J., in *Grattis v. K. C. P. & G. Co.*, 153 Mo. 392. "A servant cannot recover from the master for injuries caused by the negligence of a fellow-servant in the selection and retention of whom the master has used due diligence." *Giordano v. Brandywine Granite Co.* (Del. 1901), 52 Atl. Rep. 332.

¹ The definition of fellow-servants is a question of law. *Illinois Steel Co. v. Coffey*, 107 Ill. App. 582.

² *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 85, reversing 64 Fed. Rep. 462.

³ *Mullen v. Phila. & C. Co.*, 78 Pa. St. 25.

California.¹ In other States, however, among which are Kentucky,² Missouri³ and Illinois,⁴ it is held to be a question of fact, for the jury to decide, whether or not the injured employee and the one responsible for his injury are fellow-servants; but even in these States, where the evidence is undisputed as to the exact relations and

¹ The question of whether or not a foreman of a quarry and a laborer therein are fellow-servants or the one is vice-principal, is for the court, not the jury, to decide, in California. *Donovan v. Ferris*, 128 Cal. 48; 60 Pac. Rep. 519.

² "Whether or not a certain employee of defendant was the superior of plaintiff's intestate in the work of operating the mine in which intestate was killed, *held*, under the evidence, to be a question for the jury." *Crabtree Coal Min. Co. v. Sample's Adm'r* (Ky. 1903), 72 S. W. Rep. 24; 24 Ky. Law Rep. 1708. "The question whether the relation of fellow-servants exists only becomes a question of law when there is no dispute with reference to the facts, and when the evidence and the legitimate conclusions to be drawn therefrom are such that all reasonable men will agree to the existence of the relation of fellow-servants." *Illinois Southern Ry. Co. v. Marshall*, 112 Ill. App. 514. Judgment affirmed 71 N. E. Rep. 597; 210 Ill. 562.

³ "In an action for injuries sustained by an employee in a quarry, occasioned by the slipping of the grappling hooks which such employee and a fellow-servant fastened, allowing the stone to fall, which it was claimed was caused rather by the foreman's failure to stop the hoist after the slack was out of the chain, and then proceed to lift the stone, the evidence considered and *held* to require the jury to determine whether or not the injuries were due to the negligence of a fellow-servant instead of the foreman." *Slakes v. Missouri Granite Co.*, 92 Mo. App. 12. "The question as to who are fellow-servants is, ordinarily, one of fact." *Shickle-Harrison & Howard Iron Co. v. Beck*, 112 Ill. App. 444. "Whether one servant is a vice-principal or fellow-servant of another is a question of fact for the jury." *Chicago & E. I. Co. v. Driscoll*, 107 Ill. App. 615.

⁴ "Whether two servants of the same master come within the definition of fellow-servants is a question of fact for the jury." *Junction Min. Co. v. Goodwin*, 109 Ill. App. 144. "Whether different servants of the same master are fellow-servants, within the legal signification of that term, is a question of fact, to be determined by the jury from all the circumstances of each case." *Illinois Steel Co. v. Coffey*, 107 Ill. App. 582.

functions performed by each, then the issue is one of law for the court to decide.¹

§ 288. **Burden upon the plaintiff to establish.** — In an early Missouri case,² it was said that “*prima facie*, all servants of a common master * * * are fellow-servants. If there are facts which show that this relation does not, in fact, exist between all of such servants, the burden of showing such facts is on him who seeks to avail himself of the absence or non-existence of such relation.” This rule, in Missouri, is followed by a late decision of the

¹ This is the English rule. *Hall v. Johnson*, 8 Hurlst. & C. 589; 34 L. J. Exch. (N. S.) 222. And also obtains in California. *Callon v. Bul'*, 118 Cal. 598; 45 Pac. Rep. 1017. Missouri, *Marshall v. Schrick*, 63 Mo. 308; Illinois, *Con. Coal Co. v. Gruber*, 188 Ill. 584; 59 N. E. Rep. 254. And New Jersey, *Gilmore v. Oxford Iron Co.*, 55 N. J. L. 39; 25 Atl. Rep. 707. Mr. Labatt, in his work on Master and Servant, in discussing this question, observes: “It has been explicitly declared and is taken for granted in almost all the cases cited in this chapter that it is for the court to say whether or not the negligent employee was a vice-principal. In every case in which the facts are clearly established and show precisely what were the respective duties of the plaintiff and the delinquent co-employee and what relation they bore to one another.” *Labatt Mas. & Serv.*, Sec. 511, p. 1424. Whether miners are fellow-servants, or not, is held to be a jury question, in *Alaska Treadwell Gold Min. Co. v. Whelan*, 64 Fed. Rep. 462; but see, for reversal of this case, 168 U. S. 85. “While the question of whether servants of a common master are fellow-servants is usually one of fact for the jury, yet, when the facts are conceded, or there is no dispute with reference thereto, and all reasonable minds will agree that the relation of fellow-servants does or does not exist, then the question is one of law.” *Spring Valley Coal Co. v. Patting* (Ill. 1904), 71 N. E. Rep. 371; 210 Ill. 342. “The general rule is that the question as to whether the relation of fellow-servants exists is one of fact; yet, where the facts are conceded, and where there is no dispute whatever as to the facts, and they show beyond question that the relation of fellow-servants exists, then the question becomes one of law, and it is the duty of the trial judge to instruct the jury to find for the defendant.” *Tubelowish v. Lathrop*, 104 Ill. App. 82.

² *McGowan v. St. L. I. M. & C. Co.*, 61 Mo. 528; *Blessing v. St. L., K. C. & N. Co.*, 77 Mo. 410.

St. Louis Court of Appeals,¹ and is the generally accepted rule. Indeed, any other rule would be at variance with the elementary principles of pleading and trial practice, for it is the universally accepted doctrine that a party who alleges the affirmative of a proposition, has the burden of proving the facts from which it is derived, and this is particularly true of this issue, upon which, frequently, the right of the plaintiff to recover depends. At variance with this well established rule of practice, however, the Illinois Appellate Court has recently held that the burden of establishing the relation of fellow-servants, is upon the defendant in the case.² This is upon the theory that it is an affirmative defense and the burden rests upon the one setting up such a defense, but the court loses sight of the proposition that the duty to make out a *prima facie* case, rests, primarily, upon the plaintiff, and that if he does not, in the first instance, show that his injury was due to the negligent act of one empowered with superintendence or control, he must fail to recover. In other words, while he need not anticipate a defense, where the proof of any fact is essential to make out his own case, the plaintiff is generally required to establish such fact, before the defendant is called upon to break down a cause that lacks some of the essential elements.

§ 289. **Dual capacity doctrine.** — Although a negligent employee may actually be empowered with supervision and command over his co-employees, and as to orders or acts in which he represents the master would be held to be

¹ See the recent opinion by Judge Reyburn, wherein it is held that "One relying on the absence of the relation of fellow-servants has the burden of establishing its non-existence." *Shaw v. Bambrick-Bates Const. Co.*, 77 S. W. Rep. 96.

² "The burden of proving the relation of fellow-servants is on the defendant." *Southern Co. v. Stewart*, 108 Ill. App. 652.

a vice-principal, he will nevertheless be held to be a fellow-servant with the men in the doing of an act, while at work with them, which does not pertain to his functions as a vice-principal, but relates to the ordinary duties of a co-laborer with the miners, and which might as readily have occurred, had he possessed no authority over them.¹ This rule is very generally recognized by the courts of the different States,² but in some States it is not, for the reason that it could make but little difference to an injured employee, whether a vice-principal injured him, as a result of a negligent act, on his own part, or ordered another employee to do the act which caused the injury, and if the act fell within his authority as the master's representative to direct, he would be liable for the negligent act of his representative, the same as he would for his negligent order.³ Labatt devotes considerable space to a refutation of the dual capacity doctrine, in his recent excellent work, upon Master and Servant⁴ and the Supreme Court of Missouri

¹ *Crispin v. Babbitt* (a leading case), 81 N. Y. 516; 37 Am. Rep. 521; *Olson v. Or. Coal &c. Co.*, 96 Fed. Rep. 109; *Chicago &c. Co. v. May*, 108 Ill. 208. The act of a foreman who drops an instrument and injures a man under his supervision, is the act of a fellow-servant, in Rhode Island. *Frawley v. Sheldon*, 20 R. I. 258; 38 Atl. Rep. 870; 8 Am. Neg. Rep. 734. See, also, *Russell Creek Coal Co. v. Wells*, 96 Va. 416; 31 S. E. Rep. 614; *Chicago Iron Works v. Nagel*, 80 Ill. App. 492. In Colorado the employer is not liable for the acts of a vice-principal, done in his character as a workman. *Deep Min. Co. v. Fitzgerald*, 21 Colo. 538; 48 Pac. Rep. 210.

² Although a quarry foreman is a vice-principal as to the men under him in Indiana, so far as his orders are concerned, he is a fellow-servant, in doing an act, while at work with the men, that results in injury to them. *Stockmeyer v. Reed*, 55 Fed. Rep. 259; 37 Alb. L. J. 488.

³ *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447; 44 N. E. Rep. 876. "The mere fact that the assistant foreman of defendant company engaged in some labor as a common workman did not, as matter of law, make him any the less a vice-principal." 106 Ill. App. 21, affirmed. *Chicago Co. v. Mueller*, 68 N. E. Rep. 51; 203 Ill. 558.

⁴ *Labatt Mas. & Serv.*, Sec. 547, p. 1564.

has also opposed the application of the doctrine in that State.¹ However, in view of the modern tendency to increase the master's liability beyond that which was recognized at common law and the reasons for the recognition of a distinction between the risks assumed from the acts of an employee's fellow-servants, an act resulting from the negligence of a co-laborer, even though committed by one possessing power of command, would seem, upon principle, to be within the risks ordinarily incidental to the business, for if the vice-principal had not been performing such labor, then another laborer would, who did not possess his additional powers, and the risk of his negligence would clearly be assumed by his fellow-servant.² Where an employee occupies the dual role of vice-principal and fellow-servant, then it is usually a question of fact, whether or not the act occurred in one or the other capacity.³

¹ *Dayharsh v. Han. & St. J. Co.*, 108 Mo., p. 577. But see *Fogarty v. St. Louis &c. Co.*, 180 Mo. 490; 79 S. W. Rep. 663.

² This is the reasoning of the court, in *Chicago &c. Co. v. May*, 108 Ill. 288. The fact that a ground boss helps to put in shots and prepare blasts with the miners does not change an order he gives to an act of a fellow-servant. *Bane v. Irwin*, 72 S. W. Rep. 522.

³ "Where a servant occupies a dual role of vice-principal and fellow-servant, whether a particular act is the act of a fellow-servant or of a vice-principal is a question of fact for the jury." *Chicago & E. I. Co. v. Driscoll*, 107 Ill. App. 615. A pit boss, in Illinois, it is held in *Westville Coal Co. v. Schwartz* (177 Ill. 272; 52 N. E. Rep. 276), may or may not be a fellow-servant, according to the duties performed and the circumstances of the injury. In a recent Missouri case the Kansas City Court of Appeals held that a foreman's negligence in tossing a block of wood onto a car in such a negligent manner as to cause it to fall and kill a miner rendered the master liable therefor. *Strode v. Conkey*, 78 S. W. Rep. 678. And see, for similar holding, in Illinois, *Con. Coal Co. v. Fleischbein*, 207 Ill. 593; 69 N. E. Rep. 963. "The character of the act of a mine boss, in ordering a miner to return and fire a third blast after two have exploded, as an act of superintendence, is not altered by the fact that in preparing the blasts, lighting one, and attempting to light another, the boss acted as a fellow-servant of the miner." *Bane v. Irwin*, 72 S. W. Rep. 522. In Tennessee, it is held, that when a vice-principal undertakes the service of a fellow-servant of an injured employee, he is a fellow and not a superior servant, as to that particular

§ 290. **Master's and fellow-servant's concurrent negligence.** — While an employee, under the implied contract as to assumption of risks, is held to assume the risk of injuries from the negligence of his fellow-servants, it is only where the negligence of such fellow-servant is the

work. *Gorm v. R. R. Co.*, 101 Tenn. 380. In Illinois, the fact that a pit boss was assisting an injured miner, when he was injured, is held not to make such boss a fellow-servant, but he retains his character as a vice-principal. *Consolidated Coal Co. v. Fleischbein*, 207 Ill. 593; 69 N. E. Rep. 968. But in Minnesota, a superintendent, or foreman, when engaged with other miners, in the common service, is held to be a fellow-servant and not a vice-principal. *Dixon v. Union Iron Works*, 90 Minn. 492; 97 N. W. Rep. 375; *Strode v. Conkey*, 78 S. W. Rep. 678. Upon the question of vice-principals performing the work of a fellow-servant, the Missouri Appellate Courts are at variance with the Supreme Court. In *Donnelly v. Aida Mining Co.*, 103 Mo. App. 349, and *Strode v. Conkey*, 105 Mo. App. 15, the Kansas City Court of Appeals held that it was no defense that a foreman of a mine, in an act in the capacity of a laborer with the plaintiff, caused the injury. The same year the Supreme Court of Missouri, recognized the dual capacity of the foreman and that the master was not liable for his acts done in his capacity as a fellow-servant. *Fogerty v. St. Louis Trans. Co.*, 180 Mo. 490; 79 S. W. Rep. 664; *Bane v. Irwin*, 172 Mo. 817; and thus it is, as on other doctrines, the Appellate Courts of this State, although, under the Constitution bound to follow the last controlling decisions of the Supreme Court, continue to adhere to independent rules of their own, ignoring the mandate of the organic law of the State. The most recent decision of the Appellate Court of Missouri, on this question, seems to recognize the dual capacity of the foreman, and is at variance with other decisions of the same court. *Stevens v. Deatherage Lumber Co.* (Court of Appeals, Missouri, March 27, 1905), 86 S. W. Rep. 481. "Defendant being short of help, directed its salesman to employ plaintiff and another to assist in unloading certain heavy timbers from a car. The timbers were lifted onto skids by the salesman and one of the other employees, and let slide to the wagon, where they were received and placed by plaintiff and the teamster. One of the timbers having been raised onto the skids, the salesman gave a warning, and released his end of the beam. The other end was held a brief time longer, when it was also released, and, plaintiff failing to get out of the way in time, he was struck and injured. Held that, although the salesman be regarded as a vice-principal, his negligence, if any, in prematurely releasing his end of the beam, was in performance of his duties as a co-laborer, as to which he was plaintiff's fellow-servant."

direct cause of the injury that the master is relieved of liability for an injury resulting therefrom, and if an injury would not have happened but for the master's negligence, the fact that a co-servant's negligence concurred to bring about the result renders the master liable to the same extent as if his own negligence directly caused the injury.¹ And this same principle applies to any other cause than the negligence of a co-servant, provided it concurs with the master's negligence, as the approximate cause of the injury, for all that an employee is required to show is that such negligence was an efficient cause of the injury, although not the sole cause thereof.² But if an employee is injured as a result of the concurrent negligence of himself and a co-servant, he is without remedy,³ for his inability to

¹ *Young v. Iron Co.*, 103 Mo. 324; 15 S. W. Rep. 771; *Noble v. Bessemer Co.*, 127 Mich. 103; 54 L. A. R. 456; 68 N. W. R. p. 520; *Lago v. Walsh*, 98 Wis. 384; 74 N. W. Rep. 212. The negligence of a fellow-servant, to relieve a master, must be the direct cause of the injury. *Deweese v. Meramec Iron Co. (Mo.)*, 31 S. W. Rep. 110; *Hugue v. Furnace Co.*, 62 Mo. App. 491. "Where an injury is the result of two concurring causes, and the master is responsible for or contributed to one of them, he is not exempt from liability because a fellow-servant who is responsible for the other cause may have also been culpable. The servant assumes the risk and negligence of a fellow-servant, but not that of the master." *Jenkins v. Mammoth Min. Co.*, 68 Pac. Rep. 845. "The negligence of a fellow-servant does not relieve the master from liability to a co-servant for an injury which would not have happened had not the master been negligent himself." *Loveless v. Standard Gold Min. Co.*, 42 S. E. Rep. 741. "Coal-mine operators are liable for death of a miner from insufficient ventilation, though the act of a fellow-servant of the miner concurred with theirs in producing the result." *Czarecki v. Seattle & S. F. Co.*, 79 Pac. Rep. 750.

² *Labatt Mas. & Serv.*, Sec. 813, p. 2246; *Mullins v. California Horse-shoe Co.*, 105 Cal. 77; 38 Pac. Rep. 535; *McGregor v. Reid & Co.*, 178 Ill. 464; 53 N. E. Rep. 323; 69 Am. St. Rep. 332; *Freeman v. Coal Co.*, 25 Mont. 194; 64 Pac. Rep. 347; *Springside Coal Co. v. Grogan*, 67 Ill. App. 487; *O'Fallon Coal Co. v. Laquet*, 88 Ill. App. 13.

³ *Devlin v. Phoenix Iron Co.*, 182 Pa. St. 109; 37 Atl. Rep. 927; *Taylor v. Star Coal Co.*, 110 Iowa, 40; 81 N. W. Rep. 249; *Labatt Mas. & Serv.*, Sec. 326, p. 806; *Cooley Torts*, p. 159.

maintain an action is the same as if his own negligence was the sole cause of his injury and the same result follows for a negligent act of a co-servant, which could be imputed to him, as if he was a superior in command and ordered the doing of the negligent act,¹ for in such case, the negligence is practically his own and will, in law, be imputed to him, under such circumstances, and the fact that a co-servant may also be negligent with him would not give him any standing in court.

§ 291. **Illustration of the combined negligence of a master and fellow-servant.** — The rule that a master is responsible for the injuries resulting from the combined negligence of himself and a fellow-servant of the injured employee, is illustrated in a recent Illinois case, where an employer was held liable for an injury to an employee, injured by a fall of rock from the roof of the mine, which was due to the negligence of the employer in failing to repair the roof of the entryway to such mine, although the presence of the plaintiff at the place where the injury occurred, was admitted to be due to negligence of a fellow-servant.²

§ 292. **Grade of negligent servant originally immaterial.** — As the doctrine was originally applied, the serv-

¹ *Krutzman v. Ry. Co.*, 84 N. Y. S. 248; *Minster v. Citizens Co.*, 58 Mo. App. 276; *Labatt Mas & Serv.*, Sec. 818. "A timber having been lowered down the shaft of a mine to a landing, workmen commenced to haul it onto the landing, but, it not having been lowered quite far enough, it jammed, and, the order to lower it, further being obeyed, it fell, because a defective hook became detached, and killed a miner. *Held*, that, even if his fellow-servants were negligent in getting it jammed, this would not prevent a recovery of the master, where, notwithstanding this, the accident would not have occurred had the hook been reasonably safe." *Keast v. Santa Ysabel Gold Min. Co.*, 68 Pac. Rep. 771.

² *Chicago &c. Coal Co. v. Moran*, 110 Ill. App. 664; 210 Ill. 9; 71 N. E. Rep. 38.

ant assumed the risk of the negligence of all other servants, in the same employment, regardless of the grade or salary of the negligent employee.¹ The negligence of a servant of one grade was held to be as much one of the risks of the employment as the negligence of a servant of another grade and it was regarded as unreasonable to hold or apply the implied contract of the injured employee as including servants of a lower grade, or those of an equality with him, and to exclude servants of a higher grade, less apt to be guilty of negligence, on account of their superior skill and judgment.² This was regarded as too harsh a rule to apply, as against the employee, to compel him to assume the greater risk, under his implied contract, and not that less apt to subject him to danger. Among the more recent decisions there is a manifest tendency to hold the rule not applicable as to an employee who is injured by reason of the negligence of another employee possessing power of command or superintendence.³ Of this class of decisions, as well as those which have created the "department doctrine," it may well be said: "They are wiping out the old rule, as it was at common law, and substituting a new rule of their own creation, which the changing conditions of life may shortly prove as unacceptable to their successors as the rules of the com-

¹ *Wood v. New Bedford Coal Co.*, 121 Mass. 252; *Peterson v. Whitebreast &c. Co.*, 50 Iowa, 673; *Foley v. Chicago &c. Co.*, 64 Iowa, 644; *Keystone Co. v. Newbury*, 96 Pa. St. 246; *Reese v. Biddell*, 112 Pa. St. 72; *Waddell v. Simonson*, 112 Pa. St. 567; *Bartonsbill Coal Co. v. Reed*, 3 Macq. H. L. 266; *Bartonsbill Coal Co. v. Maguire*, 3 Macq. 11. L. 800; *O'Connor v. Roberts*, 120 Mass. 227; *Caldwell v. Brown*, 53 Pa. St. 453; *Lee v. Iron Works*, 62 Mo. 565; *Berns v. Gaston Coal Co.*, 27 W. Va. 285; *Kielly v. Belcher Min. Co.*, 3 Saw. 437; *Armour v. Kahn*, 111 U. S. 313; *Cooley Torts* (2nd Ed.), p. 639; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Quincy Mining Co. v. Kitts*, 42 Mich. 34.

² See *Cooley Torts* (2nd Ed.), p. 640 and cases cited.

³ *McDermot v. Hannibal &c. Co.*, 87 Mo. 285; *Carter v. Baldwin* (Mo. App.), 81 S. W. Rep. 204.

mon law are to them.”¹ The bulwark of the law is its adherence to precedents, and newly invented doctrines and distinctions are usually dangerous pitfalls, both for courts and litigants. No better illustration of this can be afforded than the hopeless conflict in the decisions upon the doctrines of assumed risk and fellow-servants, owing to the departures from the well trodden paths along which litigants were early forced to travel.

§ 293. **Vice-principals and fellow-servants distinguished.**—Regardless of the reason or lack of reason that prompted the drawing of a distinction between the risks assumed by an employee, under his implied contract of employment, arising from the negligence of different fellow-servants, engaged in the same common employment with him, the decisions of the courts of last resort of the different States furnish abundant evidence that for many years such a distinction has been recognized and the servant is held to assume the risk of negligence only on the part of those of equal or inferior station, and those who have been empowered by the master with supervision or control over him are very generally held to represent the master to such an extent as to make him responsible for their negligence.² For many years the United States Supreme Court recognized this distinction and held that those in the same common employment, who were intrusted by the master with the power of command, were not fellow-servants, but vice-principals, for whose negli-

¹ *Grattis v. K. C. P. & G. Co.*, 153 Mo., p. 394.

² *Smith v. Wabash Co.*, 92 Mo. 359; *McKune v. Cal. & C. Co.*, 66 Cal., 302; *Chicago & C. Co. v. McLellan*, 84 Ill. 109; *Pittsburg Co. v. Devaney*, 17 Ohio (N. S.), 197; *Johnson v. Pittsburg Co.*, 114 Pa. St. 443; *Moon v. Richmond Co.*, 78 Va. 745; *Sioux City Co. v. Smith*, 36 N. W. Rep. 285; *Ashworth v. Stanwix*, 3 El. & El. 701; *Mellors v. Shaw*, 1 Best & S. 437; *Cooley Torts*, p. 639. Sec. 543, (2 ed.); *Dresser Emp. Lab.*, p. 196; *Labatt Mas. & Serv.* (Vol. 2), Sec. 508.

gence he was legally responsible,¹ but of more recent years, no doubt on account of the hopeless conflict in the authorities that the application of such a distinction produced, the Supreme Court has returned to the doctrine as it was applied at common law, holding that all servants are within the fellow-servant rule who are engaged in the same common employment, regardless of the grade or station.² Since the Supreme Court overruled its previous decisions upon the doctrine of vice-principalship, the Courts of some of the different States have also commenced to retrace their steps,³ but this is principally true of the line of decisions in railroad cases,⁴ and although the Supreme Court has broadly held that an employee in a mine, intrusted with full power of control, with a right to hire and discharge employees, is not a vice-principal, but a fellow-servant,⁵ the courts of the different mining States have not yet commenced to follow this decision, but continue to apply the rule of vice-principalship, as furnishing a liability against the master.⁶

§ 294. **Same — Character of act the proper test. —** The determination of the question of whether or not an employee is a fellow-servant, or a vice-principal, so as to render the master liable for his negligence, by which another employee is injured, does not depend upon the grade of the service in which the negligent employee is acting, but on

¹ *C. & M. Co. v. Ross*, 112 U. S. 377 and cases cited.

² *Railroad v. Baugh*, 149 U. S. 368; *Railroad v. Hamby*, 154 U. S. 349; *Railroad v. Peterson*, 162 U. S. 346; *Oaks v. Mase*, 165 U. S. 363.

³ The Supreme Court of Missouri is slowly wending its way back. *Grattis v. K. C. P. & G. Co.*, 158 Mo., pp. 402, 403.

⁴ *Ante, idem.*

⁵ *Alaska Treadwell Gold Mining Co. v. Whelan*, 168 U. S. 86.

⁶ *Bane v. Irwin*, 72 S. W. Rep. 522; *Carter v. Baldwin*, 81 S. W. Rep. 204.

the character of the act performed.¹ Of course, in determining the question of vice-principalship, the respective duties and relations of the alleged vice-principal and his co-employees are to be considered, as well as their relations to the business generally and all the surrounding circumstances.² If, in the performance of an alleged negligent act, the servant acted for and represented the master, in a duty that he himself owed to the injured servant, then the negligent act, generally, would be held to be that of a vice-principal,³ but, on the contrary, although the alleged vice-principal, was empowered with command or supervision, if the act complained of was one which he performed in his capacity as a fellow-servant, then the master would not be responsible.⁴ The nature of the service and not the title or rank of the given employee, is, therefore, the proper test, as to whether he is a vice-principal or a fellow-servant, in the performance of the act complained of.⁵ The

¹ "Whether a person is a vice-principal or a fellow-servant, so as to render the master liable for his negligence by which another servant is injured, does not depend on the grade of service, but on the character of the act performed." *Skelton v. Pacific Co.* (Cal. 1908), 74 Pac. Rep. 13. "Whether employees of a common master are fellow-servants, so as to relieve the master from liability for injuries to one by the negligence of another, is to be determined by the nature of the act which caused the injury, and not by a difference in the rank or grade of service between the particular servants." *Galvin v. Pierce*, 54 Atl. Rep. 1014.

² The determination of the question of whether two or more persons are fellow-servants or not, depends not only on their respective duties and relations, toward each other, but their relations to the business generally and all the surrounding circumstances. *Lebanon Coal & Min. Ass'n v. Zerwick*, 77 Ill. App. 486.

³ *Labatt Mas. & Serv.*, Sec. 508., p. 1418.

⁴ *Alaska Treadwell Gold Mining Co. v. Whelen*, 168 U. S. 86.

⁵ The nature of the service and not the title or rank of an employee, is the proper test, as to whether he is a vice-principal or fellow-servant. He is a vice-principal while engaged in duties that are absolute duties of the master and while in the performance of other duties he is, properly, a fellow-servant. *Carlson v. N. W. T. E. Co.*, 68 Minn. 428, 65 N. W. Rep. 914.

character of the act complained of and not the rank of negligent employee is held to be the test in Oregon;¹ grade of the employment is held to be no criterion, in Iowa;² this is likewise the rule in Pennsylvania³ and in California⁴ and in Indiana.⁵

§ 295. **Same — Duties delegated by the master.** — As to the duties owing by the master to his employees, treated of in chapter three, if the master delegates any of such duties, either as to providing a reasonably safe place, appliances, machinery or competent employees, to an agent, he is responsible for the acts of such agent, in the line of his duties, for to hold otherwise, would be to permit the employer, by the act of delegation, to avoid all responsi-

¹ The rank or grade of the employee, is not the test, in Oregon, to determine whether a given act is that of a vice-principal, or a fellow-servant, but the character of the act done itself. And this is the proper test. *Mast v. Kern*, 84 Or. 247; 54 Pac. Rep. 950; 5 Am. Neg. Rep. 88.

² Grade of employment is no criterion, in Iowa, for determining whether a given employee is a fellow-servant or not. *Wilson v. Dunreath Q. Co.*, 77 Iowa, 429.

³ This is the Pennsylvania rule, for there, if the employee acts for the master, he is a vice-principal. *Lebbering v. Struthers*, 157 Pa. St. 312; 27 Atl. Rep. 720.

⁴ This is also the rule in California. *Nixon v. Smelting Co.*, 36 Pac. Rep. 803.

⁵ Power of control is not conclusive in Indiana, but the question of whether, in the given act, he acted for the miner or for himself. *New Pittsburg Coal Co. v. Peterson*, 35 N. E. Rep. 7. "In order to constitute servants of the same master fellow-servants, within the rule exonerating the master from liability, it is not enough that they be engaged in doing parts of some work, or in promotion of some enterprise carried on by the master not requiring co-operation or bringing the servants together, or into such personal relations that they can exercise an influence upon each other promotive of proper caution in respect to their mutual safety, but it is essential that they shall be, at the time of the injury, directly co-operating with each other in the particular business in hand, or that their usual duties shall bring them into habitual consociation, so that they may exercise an influence upon each other promotive of proper caution." *Orsot v. Indiana, I. & I. R. Co.*, 103 Ill. App. 186.

bility for a breach of duty.¹ Illustrative of this principle, it is held in Pennsylvania, that one to whom the master delegates the duty to inspect and repair machinery, is a vice-principal;² one intrusted with the duty of selecting the place of work, is not a fellow-servant, in Illinois;³ Kansas,⁴ or Missouri;⁵ one given the general supervision of machinery, is a vice-principal, in Michigan,⁶ and one given the right to furnish the tools to employees is also held to be a vice-principal;⁷ and for the violation of the duties delegated in any of these cases, since the character of the act is such that the master himself owes a personal duty to his employees, the negligence of the one to whom he in-

¹ This is also true as to orders given. *Labatt Mas. and Serv.*, Sec. 541; *Mitchell v. Robinson*, 80 Ind. 281; *Nat. Co. v. Travis*, 102 Tenn. 16; 49 S. W. Rep. 832; *Brothers v. Carter*, 52 Mo. 372; *Paterson v. Wallace*, 1 Macq. H. L. 748; *Devaney v. Iron Works*, 4 Mo. App. 236; *Mayhew v. Mining Co.*, 76 Me. 100; *Westville Coal Co. v. Swartz*, 177 Ill. 272; 52 N. E. Rep. 276; *Anderon v. Bennett*, 16 Or. 515; 19 Pac. Rep. 765; *Morgan v. Carbon Hill Co.*, 6 Wash. 577; 34 Pac. Rep. 152; *Huntingdon Coal Co. v. Decker*, 84 Pa. St. 419; *Pantzar v. Iron Mining Co.*, 99 N. Y. 368; 2 N. E. Rep. 24.

² "The person to whom a master delegates the duty to inspect and repair is a vice-principal, whose neglect is that of the employer." *Lille v. American Car and Foundry Co.* (Pa. 1904), 53 Atl. Rep. 272.

³ *Westville Coal Co. v. Swartz*, 177 Ill. 272; 52 N. E. Rep. 276. "If a master delegate his duty of furnishing the servant a safe place to work, or safe appliances, the person delegated represents the master, and is not a fellow-servant." *Roche v. Denver & R. G. R. Co.*, 73 Pac. Rep. 880.

⁴ "Where the master delegates the duty to provide his servants with a reasonably safe place to work to an agent or employee such person becomes a vice-principal, and the master is liable for his negligence." *Good Eye Min. Co. v. Robinson* (Kan. 1903), 73 Pac. Rep. 102.

⁵ *Bane v. Irwin*, 72 S. W. Rep. 527.

⁶ One whose duty it is to keep machinery in repair is not a fellow-servant with one using it, in Michigan. *Fox v. Spring Lake Iron Co.*, 89 Mich. 387; 50 N. W. Rep. 872.

⁷ One delegated by the master to furnish tools, is a vice-principal. *Lehigh Valley Co. v. Warreck*, 84 Fed. Rep. 866.

trusts the performance of such a duty, is, in law, the negligence of the master himself.¹

§ 296. **Same — Vice-principals pro tempore.** — The legal status of one temporarily filling the position of a vice-principal has occupied the attention of the courts in a great many cases. The employer is generally held responsible for the negligence of a servant temporarily intrusted with the power of superintendence or control over his co-employees, the same as he is for the negligence of one holding the position permanently,² and where the doctrine of vice-principalship obtains there can seem to be no good reason why one substituted for the vice-principal should not be held to occupy his position, with reference to the accom-

¹ *Labatt Mas. and Serv.*, Sec. 540, pp. 1545 to 1549. One employed to see that the place of work is kept safe, is a vice-principal, in *Indiana. Linton Co. v. Persons*, 11 Ind. App. 264; 89 N. E. Rep. 214. But, in Michigan, an employee furnishing a defective appliance and one using it, are held to be fellow-servants. *Rowley v. Collian*, 90 Mich. 31. "The crew of men moving a tank was in charge of a man known as a 'hook tender,' whose duty it was to give directions as to the operations of the men and selection of appliances. *Held*, that the relation of the hook tender to the crew was that of a vice-principal." *Bailey v. Cascade Timber Co.* (Wash. 1903), 73 Pac. Rep. 385. An employee, failing to repair an appliance, and one using it, were held to be fellow-servants, in *Ewan v. Lippincott*, 18 Va. 192. But see, contra, *L. & N. Co. v. Buck*, 116 Ind. 566; *Cincinnati & Co. v. McMullen*, 117 Ind. 439. "An instruction, in an action for death of a miner from black damp, that the positive duty of keeping good and sufficient ventilation in the mine being on the operators, it mattered not who performed or assisted in the work of ventilation, and if it was necessary to keep a chute open as an airway, to make a good and sufficient ventilation in another chute, and part of the duty of the loader was to keep the chute clear, he was a vice-principal of the operators, and not a fellow-servant of deceased, is proper." *Czarecki v. Seattle and S. F. Ry. & Nav. Co.*, (Wash. 1902), 70 Pac. Rep. 750.

² *Ryan v. Los Angeles Co.*, 112 Cal. 244; 44 Pac. Rep. 471; 32 L. R. A. 524; *Steube v. Iron & Foundry Co.*, 85 Mo. App. 640; *Greenway v. Conroy*, 160 Pa. St. 185; 28 Atl. Rep. 692; *Labatt Mas. & Serv.*, Sec. 509, p. 1421.

panying liability for his acts, on the part of the employer, the same as the one in whose place he is acting at the time an injury occurs. One to whom a power is given to hire and discharge men and to superintend the underground work in a mine, is a vice-principal, although he customarily makes a hand and labors with the miners,¹ as the fact that he sometimes labors with the others, as a laborer, will not, of itself, exonerate the master from liability for his acts, in the exercise of his authority over his fellow-employees.² Accordingly, one with power to direct where drill holes should be located, in a tunnel, is held to be a vice-principal, in Oregon.³ A similar rule is adopted in Missouri⁴ and Illinois⁵ and an employee in a mining plant, to whom the superintendent gave complete authority over the other

¹ "One who hires and discharges men and superintends the underground work of a mine, directing the men where and how to work, is a vice-principal, although he works with the men and performs the same character and grade of labor that they perform." *Carter v. Baldwin*, 81 S. W. Rep. 204. "Persons engaged in the service of the master, who are intrusted by him with the management or direction of his general work, or with some particular part thereof, are not fellow-servants with the subordinate employees, but vice-principals." *Johnson v. Union Pac. Coal Co.*, 76 Pac. Rep. 1089.

² "The mere fact that a servant, exercising control over the others, sometimes or generally labors with the others as a common hand, will not of itself exonerate the master from liability for such servant's negligence in the exercise of his authority over the others." (1903) *Consolidated Coal Co. v. Fleischbein*, 109 Ill. App. 509, affirmed (1904) 69 N. E. Rep. 968. "One who had authority as foreman in a brickyard when the proprietor was away will be held to have had such authority when he directed an employee to set bricks at a kiln, where he was injured by the falling of a wall thereof, though the proprietor was in the yard, he having been 100 yards away, behind another kiln." *Browning v. Kasten*, 80 S. W. Rep. 354.

³ *Anderson v. Bennett*, 16 Oregon, 515; 19 Pac. Rep. 765.

⁴ One in control, with authority to direct the men under him, is a vice-principal, in Missouri. *Cox v. Syenite Granite Co.*, 80 Mo. App. 424. See also, in Missouri, *Bane v. Irwin*, 72 S. W. Rep. 522.

⁵ *Con. Coal Co. v. Fleischbein*, 109 Ill. App. 509; 69 N. E. Rep. 968.

employees, would also generally be deemed a vice-principal and not a fellow-servant.¹ But a fellow-servant, without the master's authority, cannot, by his own act, convert himself into a vice-principal; ² he would only be held to be such as to acts which, if done by the one in whose place he was acting, would have the attribute of command or supervision,³ and for an act not in itself in the nature of superintendence as where an employee was directed to construct a scaffold,⁴ or for an act in excess of the powers delegated, although in the nature of supervision or control, the master would not, generally, be liable for the conduct of one but temporarily occupying the position of a vice-principal.⁵

¹ "Where the superintendent of a mill gave an employee control over the laborers engaged on a particular piece of work, requiring them to obey his orders, he was not a fellow-servant of the other employees, but a representative of the master." *Hunt v. Desloge Consol. Lead Co.* (Mo. App. 1904), 79 S. W. Rep. 710.

² "A fellow-servant, without a master's knowledge, cannot by assumption of authority convert himself into a vice-principal." *Hilton & Dodge Co. v. Ingram* (Ga. 1904), 46 S. E. Rep. 895.

³ *March v. Toledo & C. Co.*, 118 Mich. 154; 71 N. W. Rep. 464.

⁴ "One whom a foreman directs to build a scaffold for other servants to work on is not, while engaged in the work of construction, a vice-principal." *Metzler v. McKenzie* (Wash. 1904), 76 Pac. Rep. 114.

⁵ *Finley v. Richmond & C. Co.*, 59 Fed. Rep. 419. "Plaintiff was engaged in a quarry, in loading stone in a dump car, and running it to where it was dumped; two other servants assisting in the dumping. One of such servants, under the direction of the other, had placed a large stone beside the track in such manner that, while plaintiff was assisting in pushing the car, it fell on him and injured him. Plaintiff was subject to the orders of the servant who directed the placing of the stone. *Held*, that the servants whose negligence caused the injury were fellow-servants with plaintiff." *Smallwood v. Bedford Quarries Co.*, 68 N. E. Rep. 869. A mere passive consent, by a mine owner to directions given by one employee to another, when unaccompanied by any duty, on the part of the employee so directed to obey the other, will not render the employer liable for the negligent directions of the employee who assumes to give the injured employee orders. *Texas & Pacific Coal Co. v. Manning* (Texas), 78 S. W. Rep. 545.

§ 297. **Temporary superintendence of work, as co-employee, not decisive.** — The mere fact that one of a number of employees who are all accustomed to work in the same general employment, has power to control the actions of the other employees in such service, does not, of itself, render the employer liable for the negligent acts of the governing servant, without regard being had to other circumstances.¹ Nor would the mere fact that an employee sometimes, or generally, labored with other employees, as a common laborer, of itself exonerate the master from liability for such servant's negligence, in the exercise of his authority over the other employees,² but the question of the exact status of the employees and the relation each bears to the other must be determined from all the facts and circumstances in evidence, without reference to any particular fact, as a decisive test.³

§ 298. **Miners engaged in same common work, fellow-servants.** — The authorities are quite generally agreed that all miners or other laborers in or about mines, who are engaged in the same common employment, with the same common object of excavating, removing and drilling the ore, or treating it, in any of its different phases, are all

¹ Consolidated Coal Co. v. Fleishbein, 109 Ill. App. 509; 69 N. E. Rep. 963.

² Consolidated Coal Co. v. Fleishbein, *supra*.

³ Southern Indiana Co. v. Moore (Ind. App. 1904), 71 N. E. Rep. 516. In Missouri, the St. Louis Court of Appeals recently held that an employee of a mill, given authority by the superintendent to direct a given work, and requiring the employees to obey him, was a vice-principal. Hunt v. Desloge Con. Lead Co., 104 Mo. App. 377; 79 S. W. Rep. 710; Browning v. Kasten, 80 S. W. Rep. 354. But a different rule is announced, in Washington, and one whom a foreman directs to build a scaffold, is not, while so engaged, a vice-principal, in that State. Metzler v. McKenzie, 34 Wash. 470; 76 Pac. Rep. 114. The rule in Missouri, seems to be adhered to in Utah. Johnson v. Union Pac. Coal Co., 76 Pac. Rep. 1089.

fellow-servants, for whose negligence, the master is not responsible.¹ It is not necessary that all the employees should be engaged in the same particular work, to constitute them fellow-servants, but it is sufficient if the risk could reasonably be said to be within the servant's implied contract of assumption of risk, as contemplated by the injured employee.² Whether it is necessary that the negligent employee should have been engaged in the same department of the service as that with the injured servant, is decided differently in the different States, according to the acceptance or rejection of the department doctrine.³ In

¹ "Parties engaged in the common employment of removing ore from a mine, whether occupied in blasting, picking, loading or wheeling out the ore, are fellow-servants, within the rule exempting their employer from liability for injuries received from the negligence of servants employed in the same line of employment." *Kielly v. Belcher Silver Mining Co.*, 8 Sawyer, 300; 10 Mor. Min. Rep. 11; *Wood v. New Bedford Coal Co.*, 121 Mass. 252; *Bartonshill Coal Co. v. McGuire*, 8 Macq. H. L. Cas. 300; *Sheehan v. Prosser*, 25 Mo. App. 569; *Livingood v. Joplin Lead & Zinc Co.*, 77 S. W. Rep. 1077; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; 3 N. W. Rep. 240; *Alaska Treadwell Gold Mining Co. v. Whelan*, 168 U. S. 86; *Adams v. Iron Cliff Co.*, 78 Mich. 271; 44 N. W. Rep. 270; *Camp v. Hall*, 39 Fla. 535; 22 So. Rep. 992; *Snyder v. Viola Min. & Smel. Co.*, 2 Idaho, 771; 26 Pac. Rep. 127; *Hall v. Johnson*, 34 L. J. Exch. (N. S.) 222; *Tranghear v. Coal Co.*, 62 Iowa 576; 17 N. W. Rep. 775; *Coal Creek Co. v. Davis*, 90 Tenn. 711; 18 S. W. Rep. 878; *Cerillos Coal Co. v. Deserant*, 9 N. M. 49; 49 Pac. Rep. 807; reversed in 178 U. S. 570; *Braun v. King*, 100 Fed. Rep. 501.

² "It is not necessary that the workman causing and workman sustaining the injury, should both be engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work and performing services for the same general purpose." *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; 10 Mor. Min. Rep. 30; *Delaware & Hudson Canal Co. v. Carroll*, 89 Pac. St. 374; A miner paid by the ton, for coal mined, is a fellow-servant with miners paid by the day. *Cerrillos Coal Co. v. Deserant*, 9 N. M. 49; 49 Pac. Rep. 807. "Employees subject to the same general control of a common master and whose labor conduces to the same general purpose, are fellow-servants." *Colley v. Southern Oil Co.* (Ga. 1904), 47 S. E. Rep. 932.

³ For discussion of this question see *Labatt, Mas. & Serv. Secs 495 and 496* and cases cited.

Missouri,¹ and the Supreme Court of the United States,² this doctrine has been repudiated, as without foundation or reason to support it and as incompatible with the common law doctrine on the subject, and indeed it seems unfair to the servant to apply his common law implied contract to the more frequent risks of those with whom he is constantly in contact and to deny the application of his contract to the less frequent risks of those with whom he is less liable to come in contact; it is also disputed that the implied contract is susceptible of such subdivision and if it is not a denial of the master's common law defense to so divide it, or apportion the risks that the employee ought and those that he ought not assume, when they are all incidental to his service.³

§ 299. **Common law rule followed in Colorado.**—The holding by the United States Supreme Court, in *Alaska Treadwell Gold Mining Company v. Whalen*,⁴ following the salutary rule of the common law, has been recently followed by the United States Circuit Court of Appeals in Colorado, where it was held that the fact that a shift boss in a mine had power to temporarily suspend workmen, would not render him a vice-principal, so as to charge the master with a knowledge, on his part, of the incompetency of a fellow-servant, by whose negligence the plaintiff was injured. The court held that the shift boss was a mere fellow-servant of the plaintiff, of a superior grade, for

¹ *Grattis v. K. C. P. & G. Co.*, 158 Mo. 394.

² *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 86.

³ *Labatt Mas. & Serv.*, *supra*; *Grattis v. K. C. P. & G. Co.*, 158 Mo. 394. A common, ordinary laborer, employed about a mine, but not working with the miners, has been held not to be a co-servant with the miners at work in the ground. *James v. Emmet Mining Co.*, 55 Mich. 835.

⁴ 168 U. S. 86-88.

whose negligence the master would, in no sense, be responsible.¹

§ 300. **Mine superintendent and miners.**—A mine superintendent is usually one who has the entire charge and control of the mine, both on the top of the ground and the underground workings, and who, in the practical operation of the mine, represents the owner and acts for him, in his absence.² It is quite customary for him to delegate certain duties to a foreman or boss, both upon the surface and in the ground and the relative position of the “foreman” or “boss” and the miners will be discussed in the section following. On account of the direct supervision and entire control on the part of a mine superintendent and the fact that he seldom or rarely engages in labor with the miners, and is, consequently, not so situated that his conduct can be observed by them, it is held that he is a vice-principal and his negligence is not a risk assumed by the miners.³ But in many of the mining States, even a general superintendent is held to be a fellow-servant, upon the common law idea that all engaged in the same common employment are fellow-servants, regardless of the grade of the service⁴ and where the rule obtains, unless the employer was negligent in employing such superintendent, there would be no resulting liability for an injury

¹ *Weeks v. Scharer*, 129 Fed. Rep. 333.

² *Bane v. Irwin*, 72 S. W. Rep. 522; *Carter v. Baldwin*, 81 S. W. Rep. 205; *Livingood v. Joplin Min. Co.*, 77 S. W. Rep. 1077; *Northern Pac. Coal Co. v. Richmond*, 58 Fed. Rep. 756; *Blou v. Rockport Granite Co.*, 171 Mass. 162; 50 N. E. Rep. 525.

³ *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; 27 Amer. Rep. 510; 10 Mor. Min. Rep. 16; *Ryan v. Bagley*, 50 Mich. 179; 45 Amer. Rep. 35; *Northern Pac. Coal Co. v. Richmond*, 58 Fed. Rep. 756.

⁴ *Collier v. Steinhart*, 51 Cal. 116; *Hall v. Johnson*, 9 Mor. Min. Rep. 686; *Peterson v. Whitebreast Co.*, 50 Iowa, 673; 32 Amer. Rep. 143. “Where an employee was injured through the negligence of the superintendent directing the work, the doctrine of fellow-servants does not apply.” *Borden v. Falk Co.*, 71 S. W. Rep. 478.

caused by his negligence, either in giving an order or doing a negligent act.¹

§ 301. **Conflict of authorities, regarding mine foreman and miner.** — The decisions of the different mining States are in hopeless conflict upon the question of the proper status of a mine foreman, who has power to hire and discharge the men working under him, but who makes a regular laborer with his men, for these are the ordinary functions of the usual mine foreman. The considerations

¹ A superintendent of a stone quarry and a laborer therein are fellow-servants, in Georgia. *City Council of Augusta v. Owens*, 111 Ga. 464; 86 S. E. Rep. 830. "Evidence that the 'boss' of about twenty-two men at work on a quarry was the only man that gave directions, and was empowered to discharge men, and was accustomed to mark places where drilling was to be done, but did no drilling, was sufficient to sustain a finding that he was a superintendent, whose principal duty was that of superintendence, within the meaning of the statute relating to the liability of the master." *Mahoney v. Bay State Pink Granite Co.*, 68 N. E. Rep. 284. "A common laborer is not a fellow-servant of the superintendent or a foreman under whose directions he worked." *Kelly v. Stewart*, 98 Mo. App. 47. A superintendent of a stone quarry, in Massachusetts, as to an act in the line of the regular service of a workman, is a fellow-servant and not a vice-principal. *Riou v. Rockport Granite Co.*, 171 Mass. 162; 50 N. E. Rep. 525. For an injury from the negligence of a superintendent, in ordering machinery started suddenly, without notice or warning to plaintiff, as a result of which he was injured, see *Mathews v. Daly West Min. Co.* (Utah, 1904), 75 Pac. Rep. 722. The superintendent in a mine is not a fellow-servant with an independent contractor, who contracts to break down rock, at so much per foot, in the defendant's mine. *Mayhew v. Sullivan Mining Co.*, 76 Me. 100. "Defendant operated a railroad to carry coal from its pits to its refining works. The track descended on a trestle about thirteen feet high, with a grade part of the distance of about six feet. Such trestle was built by servants under the direction of a superintendent. It was not shown that the superintendent had complete supervision of the work, with a right to select and discharge workmen, and power to procure machinery necessary to perform the work. *Held*, that the evidence failed to show the superintendent more than a fellow-servant, and hence did not charge defendant with liability." *Maryland Clay Co. v. Goodnow* (Md. 1902), 51 Atl. Rep. 292.

which prompt the decisions that hold him to be a fellow-servant are that he is engaged in the same common employment, to attain the same common end; is in a position where his fellow-servants can observe his movements and avoid the result of his negligence, to the same extent as that of any other employee, and that it is a denial of the common law defense of assumed risk to discriminate between different employees in the master's common employment and a denial of the servant's rights, to compel him to assume the risks of those less skilled in the employment and hold that he does not assume the dangers from the negligence of those less apt to cause an injury to him. For these reasons the Supreme Court of the United States holds that a mine foreman and miner are fellow-servants, although the former has power to hire and discharge the men working under his orders.¹ A similar view obtains in Pennsylvania,² Minnesota,³ Virginia,⁴ New York,⁵

¹ A mine foreman and miner are fellow-servants, in Federal Supreme Court. *Alaska Gold Min. Co. v. Whelan*, 168 U. S. 86; 42 L. Ed. 890. A mine foreman held to be a fellow-servant in *What Cheer Coal Co. v. Johnson*, 56 Fed. Rep. 810. A foreman of a quarry and his men are fellow-servants. *Balch v. Haas*, 73 Fed. Rep. 974; *Reed v. Stockmeyer*, 74 *Id.* 186.

² Mine foreman and miner are fellow-servants, in Pennsylvania. *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; 10 Mor. Min. Rep. 30. Whether appointed by the master or acting under the statute. *Delaware Co. v. Carroll*, 89 Pa. St. 374; 10 Mor. Min. Rep. 47.

³ A mine foreman, in Minnesota, held to be a fellow-servant, in *Dixon v. Union Iron Works*, 90 Minn. 492; 97 N. W. Rep. 375. But see, *contra*, *Borgeson v. Cook Stone Co.*, 97 N. W. Rep. 734.

⁴ A member of a gang of men employed in a lime quarry, who works with the others, but acts as a foreman, also, is a fellow-servant, in Virginia. *Moore Lime Co. v. Richardson*, 95 Va. 326; 28 S. E. Rep. 334; 64 Am. St. Rep. 785.

⁵ A mine foreman and his workmen are fellow-servants, in New York, *Voshefskey v. Hillside Coal Co.*, 47 N. Y. Supp. 386.

Wisconsin,¹ New Jersey,² Maryland,³ and California.⁴ But in Ohio,⁵ Michigan,⁶ Montana,⁷ Colorado,⁸ Kansas,⁹ Texas,¹⁰ Illinois,¹¹ Missouri,¹² and

¹ A foreman of a gang of men, erecting a scaffold, was held to be a fellow-servant, in Wisconsin. *Stutz v. Armour*, 84 Wis. 623; 54 N. W. Rep. 1000.

² A mine foreman and his men are held to be fellow-servants, in New Jersey, in the case of *Gilmore v. Oxford Iron Co.*, 55 N. J. L. 39; 25 Atl. Rep. 707.

³ *State v. Quarry Co.*, 55 Atl. Rep. 366.

⁴ Foreman is a fellow-servant in California. *Stephens v. Doe*, 73 Cal. 26.

⁵ A foreman in charge of hands, is not a fellow, but a superior servant in Ohio. *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; 27 Am. Rep. 510; 10 Mor. Min. Rep. 16.

⁶ A mine foreman is a vice-principal in Michigan. *Ryan v. Bagaly*, 50 Mich. 179; 45 Am. Rep. 35.

⁷ A mine foreman, with power to hire and discharge men, is a vice-principal in Montana. *Kelly v. Fourth of July Min. Co.*, 16 Mont. 484; 41 Pac. Rep. 273.

⁸ A foreman in a quarry is a vice-principal, not a fellow-servant, in Colorado. *Lantry v. Silverman*, 1 Colo. App. 404; 29 Pac. Rep. 180.

⁹ Foreman vice-principal of miner, in Kansas. *Morbach v. Home Mining Co.*, 53 Kan. 731; 37 Pac. Rep. 122. See also *Cou, K. C., Smelting Co. v. Peterson*, 55 Pac. Rep. 673.

¹⁰ "Where plaintiff was employed by the superintendent, and told to report to a foreman, and plaintiff was not instructed in his duties, or warned of danger by the superintendent, and the plaintiff and others were called by the foreman to assist him in starting an elevator belt on certain machinery managed by him, the foreman was a vice-principal, and not a fellow-servant of plaintiff." *Waxahachie Oil Co. v. McLain*, 66 S. W. Rep. 226.

¹¹ A foreman employed by the master to take control of a particular branch of the business is not a fellow-servant of the employees under his control, but he is a vice-principal, so that his negligence is imputable to the master. *Missouri Malleable Iron Co. v. Dillon* (Ill. 1903), 60 N. E. Rep. 12; 206 Ill. 145.

¹² "A foreman in charge of a crew of miners is not a fellow-servant with the men while taking part in their work, so as to relieve the master from the liability of his negligence in doing the work." *Donnelly v. Alda Min. Co.*, 77 S. W. Rep. 130. "The instruction that the negligence of the foreman in failing to notify plaintiff was that of the defendants was not erroneous, as authorizing a recovery notwithstanding

Utah,¹ the foreman is held to be a vice-principal of the men working under him, in the mine.

§ 302. Employees and foreman of different shifts. — In the sense that all employees are fellow-servants who are engaged in the same general work and the object of whose services is to attain the same common purpose, the foreman of one shift or force of men in a mine and the foreman of another shift, ought to be held to be fellow-servants and so ought the employees under the different foremen, but upon this question, as most other similar propositions in the law of fellow-servants and master and servant, the decisions of the different States are inharmonious. In Wisconsin, a member of a day shift has been held to be a fellow-servant with a member of the night shift;² the Federal court has also held that two foremen of different shifts of men, at work in a mine, are fellow-

plaintiff knew of the change, if the foreman failed to notify him thereof." *Chambers v. Chester* (Mo. 1903), 72 S. W. Rep. 904. A ground foreman and miner are held, by the Missouri Supreme Court, not to be fellow-servants, in the recent case of *Bane v. Irwin*, 72 S. W. Rep. 522. A foreman and miner are held to be vice-principal and subordinate by both the Kansas City and St. Louis Courts of Appeals, in *Strode v. Conkey*, 78 S. W. Rep. 678 and *Carter v. Baldwin*, 81 S. W. Rep. 204.

¹ Ground foreman vice-principal in Utah. *Cunningham v. N. P. Co.*, 4 Utah, 206; 7 Pac. Rep. 795; *Trihay v. Brooklyn Co.*, 4 Utah, 468; 11 Pac. Rep. 612; *Reddon v. M. P. Co.*, 5 Utah, 844; 15 Pac. Rep. 262. In *Alaska United Gold Mining Co. v. Maset* (114 Fed. Rep. 66), a ground foreman is held to be a vice-principal; but this is in opposition to the rule laid down by the Supreme Court, in *Alaska United Gold Mining Co. v. Whelen*, 168 U. S. 85-88. "The foreman of one shift of men alternating with others in working in a mine is a fellow-servant with the members of the other shifts, and the master is not liable for an injury to one of the men caused by the negligence of the foreman of the preceding shift." *Davis v. Trade Dollar Consol. Min. Co.* (U. S. C. C. A., Idaho, 1902), 117 Fed. Rep. 122.

² A member of a day shift is a fellow-servant with a member of the night shift, in Wisconsin. *Van Den Heuvel v. Furnace Co.*, 84 Wis. 636; 54 N. W. Rep. 1016.

servants,¹ and in Utah, “pushers,” in charge of different shifts of men have been held to be fellow-servants with the men on the different shifts working under their orders.² But in Washington, workmen under different superintendents are held not to be fellow-servants,³ and a shift boss of another crew of men than the one on which an employee was injured as a result of his negligence, is held not to be a fellow-servant with such “boss”⁴ and both in Massachusetts⁵ and the Federal court,⁶ employees of different foremen, working under different contracts or employers, are held not to be fellow-servants.

§ 303. Relation of “pit boss” and miners. — The “pit boss” of a mine occupies practically the same relation toward the miners that a ground foreman does and the terms are often used interchangeably, to denote the

¹ The two foremen of different shifts of men in a mine are fellow-servants. *Davis v. Co. Mining Co.*, 117 Fed. Rep. 122.

² “Pushers,” in charge of different shifts of men, in a mine, are fellow-servants, with such men, in Utah. *Anderson v. Daly Min. Co.*, 16 Utah, 28; 50 Pac. Rep. 815.

³ Workmen under different superintendents, are not fellow-servants, in Washington. *Uren v. Golden Co.*, 24 Wash. 261; 64 Pac. Rep. 174.

⁴ A shift boss of another crew than that where a miner was engaged in work, was not a fellow-servant, in Washington. *Shannon v. Con. Poorman Min. Co.*, 24 Wash. 261; 64 Pac. Rep. 174.

⁵ Servants of different contractors are not fellow-servants, in Massachusetts, where they are under different foremen. *Morgen v. Smith*, 159 Mass. 570; 85 N. E. Rep. 101.

⁶ “Where a seaman was injured by the falling of a mast, caused by its being struck by a bucket of ore being hoisted from the hold by a derrick engineer employed by a different master from the owner of the vessel, the seaman and the derrick engineer were not fellow-servants.” *Robinson v. Pittsburg Coal Co.*, 129 Fed. Rep. 824. A shift boss, in a mill, delegated by the superintendent with power over the men, with the right to direct them when and how to work, and whose orders they were required to obey, is held, by the Missouri Court of Appeals, to be a vice-principal of the men under his orders. *Hunt v. Desloge Con. Lead Co.*, 104 Mo. App. 877.

miner intrusted with the supervision and power of command over the laborers in a mine or drift. Both are generally themselves under the orders of a superior, known as the superintendent and both usually labor with the men in the mine and aside from directing the work, make a hand with the other laborers. Hence, the same considerations that induce the courts to hold that a ground foreman is a fellow-servant with the miners, lead to a like determination in regard to the "pit boss" and in the States where a foreman is held to be a fellow and not a superior servant with the miners, the ground, or "pit boss," is held to occupy a similar position and in those States where a different view is entertained, he is held to be a vice-principal. Accordingly, in the United States Supreme Court,¹ in West Virginia,² New Mexico,³ Pennsylvania,⁴ Michigan,⁵ Indi-

¹ *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 85. "Where a shift boss in a mine had no power to hire or discharge a workman under him, but was merely a fellow-servant of plaintiff of a superior grade or class, the fact that he had power to temporarily suspend workmen did not render him a vice-principal, so as to charge the master with the knowledge of such shift boss as to the incompetency of a fellow-servant, by whose negligence plaintiff was injured." *Weeks v. Scharer*, (U. S. C. C. A., Colo., 1904), 129 Fed. Rep. 333.

² A mine boss, employed under West Virginia Code, and a miner are fellow-servants. *Williams v. Thacker Coal Co.*, 44 W. Va. 599; 30 S. E. Rep. 107; 40 L. R. A. 812.

³ A pit boss and miner are fellow-servants, in New Mexico, but a "fire boss" appointed under the statute is a vice-principal. *Cerillos Coal Co. v. Deserant*, 9 N. M. 495; 55 Pac. Rep. 290; 5 Am. Neg. Rep. 206. But see, for reversal of same case, 178 U. S. 409.

⁴ A mine boss and miner are fellow-servants, in Pennsylvania. *Haley v. Kein*, 151 Pa. St. 117; 25 Atl. Rep. 98; *Velas v. Patton Coal Co.*, 197 Pa. St. 380; 47 Atl. Rep. 360; *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153; 27 Atl. Rep. 577. But see, *contra*, *Weaver v. Iselin*, 161 Pa. St. 386; 29 Atl. Rep. 49. A slate-picker boss and his workmen under him, are fellow-servants, in Pennsylvania. *McCool v. Lucas Coal Co.*, 24 Atl. Rep. 350.

⁵ A shift boss in a mine, in Michigan, is a fellow-servant with his workmen. *Petsja v. Aurora Iron Min. Co.*, 106 Mich. 463; 66 N. W. Rep. 951; 32 L. R. A. 438.

ana,¹ and West Virginia,² the "pit boss" is held to be a fellow-servant with the miners, working under his orders, while in Illinois,³ Wisconsin,⁴ Missouri,⁵ and Kansas,⁶ the "pit boss" is held to be a vice-principal.

§ 304. "Mining captain" and miners. — Analogous to the position of "pit boss," in some of the mining States, is that of the "mining captain," who usually has charge of a crew of miners and, under the general supervision of a "manager" or superintendent, has direction and control of the men placed under his care, whether he is engaged to labor with the men or merely to direct their work. Both at common law,⁷ and under the rule announced by the United States Supreme Court,⁸ such an employee would be held a fellow-servant with the men under his

¹ A tunnel boss and a laborer in the tunnel, were held to be fellow-servants, in Indiana. *Ross v. Union Cement & Lime Co.*, 25 Ind. App. 463; 58 N. E. Rep. 500.

² In Virginia, the leader, or boss, of a gang of hands, himself under a superior, is a fellow-servant with such hands. *Richmond L. M. Works v. Ford*, 94 Va. 627; 27 S. E. Rep. 509.

³ A boss of a night shift, in Illinois, is a vice-principal, with his men. *Con. Coal Co. v. Wombacher*, 81 Ill. App. 288. Pit boss is vice-principal, in Illinois. *Con. Coal Co. v. Wombacher*, 184 Ill. 57; 24 N. E. Rep. 627.

⁴ A shift boss and miner are not fellow-servants, in Wisconsin, *McMahon v. Ida Mining Co.*, 95 Wis. 308; 70 N. W. Rep. 478.

⁵ "The relation of vice-principal borne by a mine boss towards a miner is not altered by the fact that there is a general superintendent, who has supervision of both." *Bane v. Irwin* (Mo. 1903), 72 S. W. Rep. 522. See also *Carter v. Baldwin*, 81 S. W. Rep. 204.

⁶ *Worbach v. Heine Min. Co.*, 53 Kan. 731; 37 Pac. Rep. 122; *Con. K. C. Smelting Co. v. Peterson*, 55 Pac. Rep. 673. In Pennsylvania a miner, and "ground boss" are also held to be fellow-servants in *Reese v. Biddle*, 112 Pa. St. 72; *Haley v. Kein*, 151 Pa. St. 117; *Redstone Coke Co. v. Ruby*, 115 Pa. St. 364. And see, also, *Keystone Co. v. Newberg*, 96 Pa. St. 246.

⁷ *Bartonshill Coal Co. v. Reid*, 8 Macq. H. L. Cas. 266; *Wood v. New Bedford Coal Co.*, 121 Mass. 252; *Quincy Min. Co. v. Kitts*, 42 Mich. 34.

⁸ *Alaska Gold Min. Co. v. Whelan*, 168 U. S. 85.

orders; but he is held not to be a fellow-servant in Michigan.¹

§ 305. **Inspector vice-principal of miner.** — As a general rule, all those employed by the master in a capacity wherein they represent him in the performance of some non-delegable duty, placed upon him by the law, such as to provide a reasonably safe place, to make inspections and to provide reasonably safe appliances and give proper and reasonable orders, are held to be vice-principals with those depending upon the proper performance of duties so devolving upon the master, as a matter of law.² Accordingly, it is held that a miner, intrusted with the duty of going through the mine, from time to time, and inspecting it, to ascertain if it is free from standing gas, discharges a personal duty of the master in so doing, and while so engaged he is not a fellow-servant with the other miners, depending upon the proper discharge of such duties by the inspector.³

§ 306. **“Underlooker” and miner fellow-servants.** — Almost identical with the duties of a mine inspector of more recent years, were those of an “underlooker” of some of the earlier cases, in different mining sections, such term being applied to expert miners who were employed to examine the roof of the mine and timber, or prop it, when

¹ A “mining captain” and the miners under his orders, have been held not to be fellow-servants, in Michigan. *Ryan v. Bageley*, 50 Mich. 179; 45 Amer. Rep. 35.

² *Olson v. Oregon Coal & Co.*, 96 Fed. Rep. 109; *Crispin v. Babbitt*, 81 N. Y. 516; 37 Amer. Rep. 521; *Deep Min. & Devel. Co. v. Fitzgerald*, 21 Colo. 533; 43 Pac. Rep. 210; *Labatt Mas. & Serv.*, Sec. 543, p. 1555.

³ An inspector and miner are held not to be fellow-servants, in *Gowan v. Bush*, 76 Fed. Rep. 349; 18 Mor. Min. Rep. 438. And so are inspectors, employed under statute, and the miners, in Indiana. *Neutz v. Jackson Hill Coal Co.*, 38 N. E. Rep. 324. See also, *Linton Co. v. Persons*, 11 Ind. App. 264; 39 N. E. Rep. 214.

an inspection showed timbering or props to be necessary. In accordance with the common law doctrine that all employees, regardless of the grade or character of the service, were fellow-servants, an "underlooker" and the miners at work under the roof he was engaged to inspect, were held to be fellow-servants.¹

§ 307. **Hoister-man or "cager" and miner fellow-servants.** — Employees in charge of a hoister or cage and those engaged in a mine, as miners, are so far engaged in the same common employment as to constitute them fellow-servants and this rule obtains even in those States where the different department doctrine and that of co-sociation of duties is recognized by the courts. For instance, in Tennessee, this doctrine obtains, and yet an engineer of the hoisting apparatus and the tender of a ventilating engine were held to be fellow-servants;² the same rule obtains in Illinois, where an engineer of a hoister and a tracklayer are held to be fellow-servants.³ A hoister-man and miner are also held to be fellow-servants, in Texas,⁴ Michigan,⁵ Missouri,⁶

¹ An "underlooker" in a mine whose duty it is to examine the roof of the mine and prop it, when dangerous, and a miner at work under such roof, were held to be fellow-servants, in *Hall v. Johnson*, 3 Hurl. & C. 589, and *Kelly v. Howell*, 41 Ohio St. 246.

² *Coal Creek Min. Co. v. Davis*, 96 Tenn. 711; 18 S. W. Rep. 387.

³ *Niantic Coal Co. v. Leonard*, 126 Ill. 216; 19 N. E. Rep. 294; *Stearn v. Schlethari*, 21 Ill. App. 97.

⁴ *Roe v. Thomason*, 61 S. W. Rep. 528.

⁵ *Erickson v. Victor Copper Co.*, 90 N. W. Rep. 291.

⁶ "While in the performance of his duties at the bottom of the shaft, decedent was struck on the head by a wheel falling off the car at the top of the shaft, and killed. The pin fastening the wheel on the car had been left out by the person in charge of the car. Plenty of pins for the purpose of fastening the wheel on the car were provided by defendant and at the disposal of the employee operating the car. Held, that the death of decedent was due to the negligence of a fellow-servant." *Jackson v. Lincoln Min. Co.* (Mo. App. 1904), 80 S. W. Rep. 727. "The proximate

Pennsylvania,¹ and in the Federal court.² But an employee in a mine is not held to be a fellow-servant with a foreman, who temporarily takes charge of the engine operating the cage and attempts to raise the miners out of the ground and for his negligence in so doing, the master is held responsible, in Iowa.³ Nor would an employee of a lessee engaged to hoist ore from a

cause of injury to a miner at the bottom of a shaft from the reversal of hoisting machinery and resulting fall of a bucket in consequence of a fellow-servant's negligence is such negligence, and not the defendant company's failure to supply a brake, which would have checked the fall." *Luman v. Golden Ancient Channel Min. Co.* (Cal. 1908), 74 Pac. Rep. 807.

¹ "In the construction of an underground tunnel, rock and earth were hauled in cars from the point where the excavation was being carried on, to the foot of a shaft leading to the surface. Plaintiff hauled these cars, and at the foot of the shaft turned them over to another man, who put them on a steam-power elevator operated by an engine in charge of an engineer on the surface. *Held*, in a suit for injuries against the employer, that plaintiff and the engineer were not fellow-servants." Judgment (1901), 98 Ill App. 483, affirmed. *Duffy v. Kivilin*, 68 N. E. Rep. 503; 195 Ill. 680. "Plaintiff was engaged to dig around rocks in a quarry, and to attach chains thereto, so that they could be hoisted by a steam crane. R. had charge of the work, as boss, which included the operation of the crane. Plaintiff having attached a chain to a stone, it was lifted up, and then lowered to stop its swinging, when plaintiff notified R. that the chain was not right on the stone, and asked him to wait until he fixed it. Plaintiff took hold of the chain, but R. immediately ordered the engineer to raise the stone, in which operation the chain caught plaintiff's hand. *Held*, that the operation of the crane was the act of a servant, and a duty which the master was not authorized to delegate, and the negligence of R. in prematurely ordering the engineer to hoist the stone was the act of a fellow-servant, for which the master was not liable." *Galvin v. Pierce*, 54 Atl. Rep. 1014.

² *Chapman v. Reynolds*, 77 Fed. Rep. 274; *Buckley v. Gould & Co.*, 14 Fed. Rep. 888.

³ "Where the superintendent, who had immediate control and supervision over a mine, sent an engineer away from his post, and, though he knew he was not a competent engineer, himself attempted to operate the engine in lifting the cage carrying employees from the pit of the mine to the surface. he was a vice-principal, for whose acts the employees were liable to the employees under him." *Beresford v. American Coal Co.* (Iowa, 1904), 98 N. W. Rep. 902.

mine and another employee of a different master, who had the ore of different levels leased, be held to be fellow-servants, as they are not under a common master, or responsible to the same common employer, but are entirely different and distinct employments.¹

§ 308. **Blacksmith and miner fellow-servants.** — A question arose, in Pennsylvania, as to the status of a blacksmith and a laborer on the car of a mining company, injured as a result of the former's negligence. The evidence showed that the blacksmith was employed to make car links and other things necessary in the erection of a plant for his employer; it was held that the plaintiff was engaged in the same common employment and hence was a fellow-servant.² This is not in exact accord with the line of cases which hold that an employee who is engaged to furnish machinery, tools or appliances is not, as to such delegated duties, peculiar to the master himself, a fellow-servant, but a vice-principal,³ but a similar rule was announced in the case of *Snyder v. Viola Mining Company*, and a miner and

¹ "A servant of a mining company working at the bottom of a shaft which is operated by the company to hoist ore from the various levels of the mine for lessees of the levels, and an employee of a lessee allowing ore to fall and injure the former, are not fellow-servants." *Union Gold Min. Co. v. Crawford*, 69 Pac. Rep. 600.

² A blacksmith making a link for a car, and a laborer on the car, are fellow-servants. *Buck v. N. J. Zinc Co.*, 204 Pa. 182; 58 Rep. 740; 60 L. R. A. 453.

³ *McLain v. Sewall Co.*, 51 Cal. 255; *Hoosier State Co. v. McLain*, 138 Ind. 231; 81 N. E. Rep. 956; *Angusta v. Owens*, 111 Ga. 464; 36 S. E. Rep. 880; *Richmond Granite Co. v. Bailey*, 92 Va. 554; 24 S. E. Rep. 232; *Labatt Mast. Serv.*, Sec. 548, p. 1555. "Where plaintiff's intestate, a blacksmith's helper in a machine shop, was killed by the explosion of a piston head while it was being heated by H., who was employed at a forge adjoining that at which plaintiff's intestate worked, H., not having been instructed by defendant with any duty with regard to other employees, was decedent's fellow-servant, for whose negligence defendant was not liable." *Duff v. Willamette Iron & Steel Works* (Or. 1904), 78 Pac. Rep. 363.

blacksmith, in the same common employment, were held to be fellow-servants.¹

§ 309. **Employees using same scaffold are fellow-servants.**—The rule that those are regarded as fellow-servants, for whose negligence the employer is not responsible, whenever the general object of the service is the same, or the employees are so situated as to be able to observe the conduct of each other and report any remissness of duty to a superior, has been held, in Michigan, to apply to employees engaged upon a scaffolding or staging, and for an injury to one of such employees, from the negligent act of another, there could be no recovery from the employer.² But if the injury to such an employee was caused by defective material furnished for a scaffold, by the employer, the fact that a fellow-servant's carelessness, in using such material, contributed to produce the injury, would not relieve the employer from liability, for he is responsible for injuries from the concurrent negligence of himself and a fellow-servant of the injured employee.³

¹ A blacksmith and miner are fellow-servants. *Snyder v. Viola Min. Co.*, 26 Pac. Rep. 127.

² *Haas v. Marritt*, 62 Mich. 386: "Where a foreman and an employee are laboring together, unloading stone with a derrick, negligence of the foreman in such work is negligence of a fellow-servant." *Dolose & Shepard Co. v. Schultz*, 101 Ill. App. 569. "Where a carpenter employed with others on the repair of a house acted as foreman of the work, his negligence in constructing a scaffolding or in causing the same to be constructed was not the negligence of a fellow-servant as to the other servants, notwithstanding that at other times he labored with them in the common employment." *Neves v. Green*, 86 S. W. Rep. 508. "A servant engaged in loading pieces of stone into a box attached to the arm of a derrick is a fellow-servant with one whose sole duty it is to observe when the box has been filled, and to give notice to the engineer to elevate the box; the latter servant being vested with no power of control over the other workmen, and the master being represented by another person." *Shaw v. Bambrick-Bates Const. Co.* (Mo. App. 1903), 77 S. W. Rep. 96.

³ *Clark v. Soule*, 137 Mass. 380.

§ 310. **Timber-man and miner.** — Under the rule that an employee engaged to perform non-delegable duties which the law imposes upon the master, to provide a reasonably safe place, machinery, servants and rules, is a vice-principal and stands in the place of the master, one engaged to timber the mine, would seem to be within the rule which would prevent the employer from delegating to him his duty to furnish a reasonably safe place, so as to relieve himself from liability for his negligence.¹ This is the rule adopted in some of the States, and in Colorado a timberman is held to be a vice-principal,² and not a fellow-servant, and this has also been held in Illinois, by the Appellate Court of that State, where a miner and one employed to timber the mine are held not to be fellow-servants.³ But in a later case the Illinois Appellate Court held that a timberman and “dirt-scratcher” were fellow-servants,⁴ but just what reason prompted the distinction between the relation of the “dirt-scratcher” and the timberman and that of a miner and timberman is not exactly plain.

§ 311. **Statutory “fire boss” and miners.** — Under the provisions of the Mine Ventilation Act, of Pennsylvania (March 3d, 1870), the “mining boss,” required by the act and the miners, employed to work in the mine, are fellow-servants, and if the requirements of the statute as to their selection are complied with, and the employer is guilty of no negligence in their selection, he would not be

¹ *Westville Coal Co. v. Swartz*, 177 Ill. 272; 52 N. E. Rep. 576; *Anderson v. Bennett*, 16 Oregon, 515; 19 Pac. Rep. 765; *Pantzar v. Tilly Foster Min. Co.*, 99 N. Y. 368; 2 N. E. Rep. 24; *Kansas P. Co. v. Little*, 19 Kan. 267; *Labatt Mas & Serv.*, Sec. 540, p. 1545.

² A timberman, employed to timber a drift, is a vice-principal, in Colorado. *Grant v. Barney* (Colo.), 40 Pac. Rep. 771.

³ A timberman and miner are not fellow-servants, in Illinois. *Con. Coal Co. v. Schreiber*, 65 Ill. App. 804.

⁴ A timberman and a “dirt-scratcher,” in Illinois are fellow-servants. *Kelleyville Coal Co. v. Humble*, 87 Ill. App. 437.

responsible for the death of a miner, due to the negligence of such "mining boss."¹ A similar construction of the English statute "Regulating Coal Mines" (35 and 36 Vict. Ch. 76) was adopted in England and where a miner, employed in a colliery, was killed by an explosion of "fire-damp," it was held that "the fact that the manager was appointed pursuant to the act, did not put him in any different position from what he would have held, had he been appointed manager, and that he was a fellow-servant with the deceased and the defendants were, therefore, not liable to the representatives of the deceased, for his death."² The courts of Colorado,³ Washington⁴ and Tennessee⁵ adopt a similar view, as to the statutory "fire boss," engaged in pursuance of the provisions of the miners' statutes of these States. But an opposite view is expressed by the Supreme Court of Kansas in a recent well considered case⁶ and the "fire boss," employed under the miners' statute of that State, like a foreman or "pit boss" is held to be a vice-principal of the miners, working the mine.

¹ *Delaware and Hudson Canal Co. v. Carroll*, 89 Pa. St. 347; 10 Mor. Min. Rep. 47.

² *Howells v. Landore Steel Co.*, L. R. 10 Q. B. 62.

³ A mine boss, employed under statute, and a miner, are fellow-servant. in Colorado. *Colo. C. & I. Co. v. Lamb* (Colo. App.), 40 Pac. Rep. 251.

⁴ The operative of a fan to prevent gases, is a fellow-servant, in Washington, with the miners. *Hughes v. Improvement Co.*, 20 Wash. 294; 55 Pac. Rep. 119. A "fire boss," employed under the Washington statute is a fellow servant, with miners. *Morgen v. Coal Co.*, 6 Wash. 577; 84 Pac. Rep. 152.

⁵ A miner having charge of ventilation and the hoister man are fellow-servants, in Tennessee. *Coal Cr. Co. v. Davis*, 90 Tenn. 711; 18 S. W. Rep. 387.

⁶ *Schmalstieg v. Coal Co.*, 65 Kan. 753; 70 Pac. Rep. 888; 59 L. R. A. 707. In Alabama, by statute, the alleged negligent act of a vice-principal, must be by one "intrusted with superintendence, done while in the exercise of such superintendence." (Ala. Code, Sec. 2590.) *Drennen v. Smith*, 115 Ala. 396; 22 So. Rep. 442.

§ 312. **Workmen upon same machine or drill fellow-servants.**—Where two or more employees are engaged in labor upon the same machine, or drill, in a mine, they are fellow-servants, both upon reason and authority, even in those States where the department doctrine obtains, and it is necessary for employees to have a consociation of work as well as be employed in the same general grade and common object in the business, for the work of those engaged upon the same machine, or drill, is not only the same, in the same department, but both should be familiar with the ordinary duties of the other and so situated as to observe and report his conduct to a superior. To give effect to the common law doctrine of assumed risk at all, therefore, such employees ought to be held fellow-servants. Accordingly, in Missouri, one operator of a machine cannot be regarded as a vice-principal, to such an extent as to render the employer liable for the sudden starting by him of the machine, which results in the injury of his companion.¹ In the same State, the operator of a steam drill, in a mine, commonly called a “drillman” and his helper, engaged to labor on the same machine and do the bidding and wait upon the “drillman,” are held to be fellow-servants,² and a similar holding was announced in the Federal court as to a “drillman” and his helper.³

¹ “Plaintiff, who assisted in operating an iron die, and the operator of the machine, by whom it was started, were fellow-servants, and plaintiff could not recover for such operator’s negligence in starting the machine without giving plaintiff notice of his intention to do so.” *Richardson v. Mesker* (Mo. 1908), 72 S. W. Rep. 506. “An employee engaged in charging holes in rock with dynamite and exploding the same, is a fellow-servant of the employees engaged in drilling the holes for the charges.” *Hoe v. Boston & N. St. Ry. Co.*, 72 N. E. Rep. 841; *Welch v. Same, Id.*; *Lane v. Same, Id.*; *Donahue v. Same, Id.*

² *Livengood v. Joplin Zinc & Lead Mining Co.*, 77 S. W. Rep. 1077.

³ A drill operator and his helper are held to be fellow-servants in *Brown v. King*, 100 Fed. R p. 561. Also in Missouri, *Livengood v. Zinc Min. Co.*, 77 S. W. Rep. 1077.

§ 313. **Same — Crusher-feeder and miner.** — One engaged to work in feeding rock into the crusher in a mine and a miner are so far engaged in the same common object of preparing the ore for market and extracting it, as to be within the rule that subjects the miner to dangers resulting from the negligence of the former, and vice-versa, although they may not be so situated as to observe the act which resulted in the injury, as the object of their common labor is the same, although they are not engaged in the identical department of the service. Accordingly, in Colorado, where a mine was operated in connection with a tramway, which conveyed the ore from the mine to the mill, where it was milled and prepared for the market, and in so doing the rough rock was fed into a crusher, by one employed to push it into a hopper or vat, connected with the rolls, the whole business was held to constitute one common enterprise, to such an extent that the master was not liable for an injury to the crusher-feeder by reason of a sledge hammer being thrown into the crusher with the rough ore, by the miner, but such crusher-feeder and miner were held to be fellow-servants, engaged in the same common employment to attain the same general object.¹

§ 314. **Track-layers and miners.** — Upon principle, a track-layer of a tramway track or other track, to transport the ore from a mine either upon top of the ground or beneath the surface, should be held to be a fellow-servant with a miner, as both are engaged in the same common employment, the excavation and removal of the mineral and the miner should be held to assume in law the dangers resulting from the negligence of such track-layer, the same as he would that of the hoister-man or “cager,” who

¹ *Malique v. Iowa Gold Mining & Milling Co.*, 71 Pac. Rep. 427.

is also engaged in the same common object. The appellate court of Illinois, in accordance with this general rule, has held that a track-layer and a miner, engaged in work in the bottom of the mine, occupied the relation of fellow-servants toward each other and the master was not liable for any resulting injury from the negligence of either.¹ But in Washington, an employee engaged in laying track, for the purpose of transporting coal from the mine, and a miner at work in the ground, were held not to occupy the position of fellow-servants toward each other,² and in Kentucky, it was also recently held that an employee in charge of a furnace in a department of a mine was not a fellow-servant with a tracklayer, so as to deprive him of an action for an injury from the latter's negligence.³

§ 315. **Engineer and miners.** — In most of the States where the question has been passed upon by the courts of last resort, the engineer in a mine, whether of the hoister or cage, or the machinery which operates the mine, is held to be a fellow-servant with the miners in the ground. In Tennessee, the engineer of a mine engine and the servant in charge of the ventilating fan, have been held to be fellow-servants;⁴ an engineer and a miner have been held to be fellow-servants, in Pennsylvania;⁵ by an indirect

¹ A track-layer and "bottom-digger" are fellow-servants, in Illinois. *Coal Valley Min. Co. v. Nelson*, 87 Ill. App. 180.

² An employee building a road for transporting coal, from a mine, and an employee at work in the mine, are not fellow-servants, in Washington. *Evans v. Carbon Hill Coal Co.*, 47 Fed. Rep. 437.

³ "An employee, whose duty it is to keep up the furnace fire in the air shaft of a mine, is not a fellow-servant of employees of the same master whose duty is track-laying in the mine, and by whose negligence he is injured." *Angel v. Jellico Coal Min. Co.* (Ky. 1908), 74 S. W. Rep. 714; 25 Ky. Law Rep. 108.

⁴ *Coal Mining Co. v. Davis*, 90 Tenn. 711; 18 S. W. Rep. 387.

⁵ An engineer and a miner are fellow servants, in Pennsylvania. *Bradbury v. Coal Co.*, 157 Pa. St. 231; 27 Atl. Rep. 400.

holding, a similar rule is adopted, in Missouri;¹ in California they are held to be fellow-servants² and this is also the rule in Utah³ and Alabama.⁴ But in Illinois, however, where not only the grade of the employee, but the department of the common employment in which he may be engaged is held to be a material factor in determining his relation, toward his co-employees, the engineer of an engine used to raise and lower miners into the mine, is held not to be a fellow-servant with those engaged in working in the ground, because they were not so situated as to observe his conduct and report any negligence or unfitness to a superior.⁵ This case seems at variance with the current of authority upon this proposition, for under the common-law doctrine of fellow-servants all those engaged in the same common employment and laboring to attain the same purpose, were fellow-servants and the negligence of all such employees was assumed as a risk incident to the business.

§ 316. **Tramway operator and miners fellow-servants.** — So nearly are all those identified in the same common purpose, who are engaged in the excavation of the mineral and the hauling and cleaning of it and preparing it

¹ *Shehan v. Proser*, 55 Mo. App. 569.

² An engineer and miners are fellow-servants, in California. *Tre-watha v. Gold Min. Co.*, 28 Pac. Rep. 571.

³ An engineer running the hoister and miners are fellow-servants, in Utah. *Stoll v. Daly Min Co.*, 19 Utah, 271; 57 Pac. Rep. 295.

⁴ The engineer of a stationary engine on tramway and engineer of pump engine, are fellow-servants, in Alabama. *Wheatley v. Zenida Coal Co.*, 25 So. Rep. 124.

⁵ A coal miner and mine engineer were held not to be fellow-servants in Illinois, where their duties did not require co-operation and they were not engaged in the same work at the time of the injury. *Spring Valley Coal Co. v. Patting*, 112 Ill. App. 4; 210 Ill. 448; 71 N. E. Rep. 871. An engineer of the hoister and a miner in a coal mine are held to be fellow-servants in Illinois, in *Starne v. Schlothane*, 21 Ill. App. 97.

for the market, that the operator of cars upon a tramway, used to haul the mineral from the mine to a mill, where it is cleaned, and the miners who excavate it from the ground are fellow-servants, engaged in the same common object.¹ In Colorado, the foreman of a tramway, where cars are used to transport the ore from the mine to a mill, and a teamster, employed to haul machinery and other materials to the mine, are held to be fellow-servants;² in Alabama, an employee in charge of a tramway and another employee engaged in running the cars upon such tramway, are held to be fellow-servants,³ and in Michigan, although in separate departments of the service, an employee in charge of a blast furnace and another employee engaged in handling cars, upon the premises, are held to be fellow-servants.⁴

§ 317. “**Tub-hustlers**” fellow-servants.—Under the general rule that all employees engaged in the same employment, to attain the same common object, are fellow-servants, those engaged in handling tubs, to transport the ore from the face of the drift, where it is excavated, or

¹ *Woodward Iron Co. v. Cook*, 124 Ala. 349; 27 So. Rep. 455; *Denver Co. v. O'Brien*, 8 Colo. App. 74; 44 Pac. Rep. 766.

² The foreman of a tramway and a teamster hauling to the company are fellow-servants, in Colorado. *Denver Co. v. O'Brien*, 8 Colo. App. 74; 44 Pac. Rep. 766.

³ One in charge of a tramway and the operator of the cars are fellow-servants, in Alabama. *Woodward Iron Co. v. Cook*, 124 Ala. 349; 27 So. Rep. 455.

⁴ “Servants engaged in placing empty cars on a track to be loaded by the plaintiff are not, while performing such work, fellow-servants of the plaintiff, where the common master had, by virtue of contract with the plaintiff, obligated itself so to place such cars; and this, notwithstanding such servants were ordinarily engaged with the plaintiff in the same general line of employment.” *Spring Valley Coal Co. v. Robizs*, 111 Ill. App. 49. Although in separate departments of the service, an employee in charge of blast furnace and another employee handling cars upon the premises, are fellow-servants, in Michigan. *Adams v. Iron Cliff Co.*, 78 Mich. 271; 44 N. W. Rep. 270.

from the mine to the mill, over a tramway, are held to be fellow-servants, as they are engaged to attain the same common object and are actually engaged in the same particular work, in the same department of the service and should even be held to be fellow-servants, in those States where the department doctrine is held to obtain. This is the rule adopted in Missouri,¹ where the department doctrine has been repeatedly affirmed and adhered to and should be the rule adopted in all jurisdictions where the doctrine of fellow-servants is at all recognized, for there could be no better illustration of those engaged in a co-sociation of work or labor than employees passing and re-passing, handling, by the same machinery and methods, different tubs, used for the same purpose, over the same track. They are so situated as to observe the conduct of each other and to report any remissness to a superior authority and this is the test, in those States where the department doctrine is still recognized.

§ 318. “**Trimmers**” and **miners fellow-servants**. — Of those who are engaged in the actual work of excavation, in a mine, the employees who use the pick and those who use the shovel are usually called “trimmers” and “shovellers,” the former first coming in contact with the

¹ “At the time plaintiffs’ son received the injury resulting in his death he was working in defendant’s mine, and his duties were to take a tub from a cable, which was lowered into the shaft, and run it on cars to the face of the drift several feet away, there load it with dirt, and return it, hook it onto the cable, have it hoisted five or six feet, steady it, and then immediately load an empty tub onto the cars and return to the face of the drift. The man handling the tub at the mouth of the shaft and decedent were both ‘tub hustlers,’ but under different foremen, both foremen being in the employment of the defendant. Both ‘tub hustlers’ were co-operating together in the transportation of dirt from the face of the drift to the mill. *Held*, that the ‘tub hustlers’ were fellow-servants.” *Jackson v. Lincoln Min. Co.* (Mo. App. 1904), 106 Mo. App. 441; 80 S. W. Rep. 727.

ground, in the process of excavation, and the latter, following, with their shovels, the work of the "trimmers." They are both engaged in excavating the mineral and in the same department of service and the identical work, only pursuing different methods of obtaining the same object. Under the fellow-servant doctrine, therefore, the "trimmers and shovellers," or miners engaged in similar branches of the same common employment are, essentially, fellow-servants, even in those States where the department doctrine is adhered to. A "trimmer" in a drift of a mine and a miner are held to be fellow-servants, in Iowa,¹ and upon principle, this is the only status in which they could be regarded, both from the same well-established rule as to those in a position to observe and report the negligence of a fellow-servant, which he is held, consequently, to assume, as one of the risks incident to the business and also because they are engaged in the same grade of employment.

§ 319. **Driver-boy and miner fellow-servants.** — In accordance with the general rule that the attainment of the same common object, in the service, determines the status of employees, rather than the performance of the same identical service, in the same department,² a driver-boy, employed to haul coal from the chambers of a coal mine, has been held to be a fellow-servant with the miners engaged in excavating the coal.³

§ 320. **Miner and employee on surface fellow-servants.** — In some of the cases more significance is attached to the common end, or object of the service, than to the

¹ The trimmer of a drift, in Iowa, and a miner, are fellow-servants. *Fosburg v. Philipps Co.*, 61 N. W. Rep. 400.

² *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432.

³ *Waddell v. Simonson*, 112 Pa. St. 567.

identity of departments, or the opportunity of the given employee to observe the conduct or service of his co-employee.¹ This was true in a case where a miner in the tunnel or drift of a mine was held to be a fellow-servant of a laborer whose duty was to deliver the miners on the surface, at the shaft.²

§ 321. **Quarry laborer and operator of cars not fellow-servants.** — The rule laid down in the preceding sections, would perhaps not be followed, in Missouri, for in that State, although the department doctrine has been, practically, abandoned,³ it is held that the injured employee must have an opportunity to observe the conduct of his co-employee, before he will be held to be a fellow-servant, and that an employee in a quarry and an operator of cars, used to haul the rock excavated, are not fellow-servants,⁴ in the same common employment.

§ 322. **Powder man and laborer fellow-servants.** — The character and scope of the duties of the employees, in some States, are held to determine the relation of co-employees, and in others the rule is recognized that to be fellow-servants the one must have had the opportunity to observe the other's acts. This rule, applied to those handling powder, or similar explosives, would lead to different views as to the status of the employees, according to the State or jurisdiction where the injury occurred.

¹ *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432.

² *McAndrews v. Burns*, 10 Vt. 117; *Black's Law & Pr. Acc. Cas.*, Sec. 363, p. 465.

³ *Grattis v. K. C. P. & G. Co.*, 153 Mo. 399. The superintendent of a quarry and one engaged therein in breaking stones held not fellow-servants. *Turrentine v. Wellington* (N. Car.), 48 S. E. Rep. 739.

⁴ *Dixon v. Chicago & C. Co.*, 109 Mo. 413. True, in this case, the employee in the quarry had no connection with the train service and this was one of the decisive questions.

In Maryland, a powder man, in a quarry, and a laborer, although employed in another branch of the master's service, are held to be fellow-servants.¹ An employee engaged to drill holes for powder blasts and another employee engaged in clearing away rubbish, are held to be fellow-servants in Pennsylvania² and one engaged in blasting rock and another engaged in the work of hauling such rock away, are held to occupy the same relation in Indiana.³

§ 323. **Substitute for fellow-servant is also fellow-servant.** — The rule that those engaged in the same common work, in a mine, are fellow-servants, has been held, in Washington, to apply to a substitute, engaged to temporarily take the place of a fellow-servant of an injured employee and for an injury from the negligence of such substitute, the same as for the negligence of the fellow-servant, whose place he is filling, the master is not responsible, as the substitute is held to be a fellow-servant with a fellow-servant of his hirer, to the same extent that the

¹ One employed to load powder into holes in a quarry and an inexperienced employee in such quarry are fellow-servants, in Maryland. *State v. Schwind Quarry Co.*, 55 Atl. Rep. 366. "An employee engaged in charging holes in rock with dynamite and exploding the same is a fellow-servant of the employees engaged in drilling the holes for the charges. An employee, while engaged in assisting the foreman or superintendent in making an inspection after a blast of dynamite for the purpose of ascertaining whether any part of the charge had failed to explode, is performing a part of the master's duty, and is not a fellow-servant of those engaged in drilling holes for the charge and removing the rock after the blast." *Hoe v. Boston & N. Co.* (Mass.), 72 N. E. Rep. 341.

² One drilling holes and another clearing away rubbish are fellow-servants in Pennsylvania. *Somer v. Harrison*, 81 Atl. Rep. 799. See, also, *Livengood v. Min. Co.*, 179 Mo. 129; 77 S. W. Rep. 1077; *Whaley v. Coleman*, 88 S. W. Rep. 119.

³ A servant employed to blast rock and one engaged in hauling such rock are fellow-servants in Indiana. *Bogard v. Louisville & C. Co.*, 100 Ind. 491.

hirer would have been a fellow-servant with the injured employee.¹ This is, clearly, the correct position, for as to the injured employee the substitute takes the place of the absent servant, just the same as if the substitute had been engaged to labor in the same capacity in his own place, instead of that of another, and the injured employee, by continuing in the service with him, without objection, assumes the risk of injury from his negligence, to the same extent as he did that of his hirer.

¹ One hired as a substitute, is a fellow-servant with a fellow-servant of the hirer, in Washington. *Anderson v. Guineam*, 9 Wash. 304; 37 Pac. Rep. 499.

CHAPTER XIV.

STATUTES REGARDING SAFETY OF MINERS.

- SECTION 324.** Object and general nature of such statutes.
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 - 344. Same — When willful violation of statute necessary.
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 - 350. Signalling — Hoisting apparatus.
 - 351. Statutes requiring inspections.
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 - 353. Assumption of risk from breach of statutory duty.
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§ 324. Object and general nature of such statutes.—
On account of the extremely hazardous character of such
(350)

operations, and the absolute inability of those engaged in mining to provide such ways, appliances and surroundings as will make the safety of employees from accident commensurate with the compensation paid, or as small as the risk incurred in most of the other avocations in life, where men are employed by others to carry on the business, the different appliances, means and manner of conducting mining operations has engaged the attention of the legislatures of most of the mining States, with a view of protecting the life and limbs of miners as far as possible from those unfortunate occurrences to which they are hourly subjected in this dangerous avocation. The character of the protective legislation, in the different mining States, necessarily differs, with the character of the mineral excavated and the means used to mine it and the extent and volume of the business and the number of men employed. The risks from operating a placer mine is comparatively small, as compared to the dangers of "fire damp," falling slabs, slate or coal, in coal mines, conducted on a large scale, and the liability of injuries from the ordinary excavations in quarries, where the surface is removed, as the excavations progress, is not so great as that resulting from an underground lead or zinc mine, with many drifts, where injuries from defective appliances used for hoisting and lowering the men into the mine and unsafe trimming of the roof, or a failure to inspect, or properly timber and brace the walls and roof of drifts, subjects the miners to the risk of almost momentary accidents. The general object of such statutes is in the main the same, however, for all are based upon the fundamental and beneficent principle that the State should, as far as possible, under its police powers, regulate the methods and appliances used in dangerous callings, so as to minimize, as far as possible, injuries to those of its inhabitants who, by force of circumstances

beyond their control, are compelled to risk their lives and persons in the more dangerous callings.

§ 325. **Chapter devoted to constructions of statutes.** — Lawyers of the different States, do not, as a rule, consult a general text-book, upon a given subject, to ascertain the exact requirements of any local statute, but, not only because the statute itself is the best evidence of its provisions, but also because of the numerous changes, amendments and revisions, in the different States, to all of the legislative enactments, practitioners, generally, acquire the habit of going directly to the statute itself, for the purpose of ascertaining its exact terms and conditions. For this reason, a citation of all the present statutes in the different mining States will not be attempted here, but only a reference to the constructions of the courts of last resort in the different mining States, which will enable the practitioner to discover what is the proper interpretation of his own statute, on a given point, either by the courts of his own State, or those of a sister State, or the Federal courts, where that, or a similar statutory provision, has been judicially determined. Most of the different statutes have been consulted, in the preparation of this work, but it is not deemed proper to occupy the space to quote the exact or substantial provisions of such statutes, for the reasons above given, and if the substance of the different statutes is not given, then a reference to the statute is out of place, for it would, ultimately, have to be consulted for its provisions, which could as well be done, in the first instance.

§ 326. **Such statutes constitutional, as police regulations.** — Statutes providing for the inspection, securing the safety and ventilation of the mines, are very generally held to be proper police regulations, for the health and safety of citizens of the different mining States and their provi-

sions enforced, by the courts.¹ The constitutionality of such statutes has been decided in Pennsylvania,² Illinois,³ Ohio,⁴ Indiana⁵ and Missouri,⁶ and no doubt the reasoning and holdings of these courts would prompt those of other mining States to enforce the provisions of similar statutes, designed for the protection and safety of a large class of the population of such States.

§ 327. Statute does not abrogate common law liability. — The fact that there is a particular statute which applies to the liability of a mine owner for a given injury, does not necessarily absolve him from his common law liability for damages for the same injury and the employee can, generally, either sue for the negligence of his employer at common law, or under the statute.⁷ In New York, under the Employers Liability Act (Statute of 1902,

¹ Com. ex rel. Williams v. Bonnell, 15 Mor. Min. Rep. 14; Com. ex rel. Williams v. Wilkesbarre Coal Co., 29 Leg. Int. 213; 15 Mor. Min. Rep. 81.

² Ante, *idem*.

³ Daniels v. Hillgard, 27 Ill. 640; 15 Mor. Min. Rep. 280.

⁴ Krause v. Morgen, 53 Ohio St. 26; 40 N. E. Rep. 886.

⁵ Wooley Coal Co. v. Bracken, 46 N. E. Rep. 775.

⁶ Hammon v. Central Coal Co., 156 Mo. 232. The statute for the fencing of machinery in Missouri, is held to be constitutional for the same reasons that those acts are held to be providing for the ventilation of mines, i. e., as beneficent police regulations. Lore v. Amer. Mfg. Co., 160 Mo. 608; 61 S. W. Rep. 678. The prop statute in Missouri (Sec. 8822), is held to be constitutional in Hammon v. Coal Co., 156 Mo. 232. The Illinois statute for Safety and Inspection of Mines, is a police regulation, passed in obedience to a constitutional provision, and a violation of the act is equivalent to a willful and intentional injury, in contemplation of law. Donk Bros. Coal Co. v. Stroff, 100 Ill. App. 576. Illinois statute, July 1, 1895, requiring the mine owner to pay an inspection fee, is not unconstitutional, because of a failure to limit the times and occasions of inspections, as too many inspections would injure the owner and this is interdicted by the act itself. Chicago &c. Coal Co. v. People, 181 Ill. 270; 54 N. E. Rep. 961.

⁷ Cecil v. Amer. Steel Co., 129 Fed. Rep. 542.

ch. 600) regulating the liability of employers for injuries to employees, it is held that the statute does not take away the right of an employee to maintain an action under the common law, for an injury sustained subsequent to the taking effect of the statute.¹ And in Ohio, under the Miners Act (R. S. Ohio, 1892, Sec. 6871) requiring the owner to keep a sufficient supply of timber on hand and supply the same to the miners, it is held that since the act does not define the degree of care, required of the mine owner, that such care should be determined by the principles of the common law.²

§ 328. **Violation of statute constitutes negligence.**—The breach of a duty imposed by statute, generally, constitutes negligence *per se*, whether the violation of the statutory provision arises from a mere act of omission or commission.³ The statute does not, of course, place the absolute duty of an insurer upon the operator of a mine subject to its provisions, but without a penalty, either by way or damages, or otherwise, for a violation of the statute, such enactments would be a useless waste of time.⁴ And it is therefore very generally

¹ *Gmaehle v. Rosenberg* (Ct. App. N. Y. 1904), 16 Am. Neg. Rep. 168. "The statute of 1903, ch. 600, regulating the liability of employers for injuries to employees, does not take away the right of an employee to maintain an action under the common law for an injury sustained subsequent to the passage of the act."

² *Cecil v. Amer. Sheet Steel Co.*, 129 Fed. Rep. 542. There is, however, no common law liability created under the Illinois prop statute. *Con. Coal Co. v. Young*, 24 Ill. App. 255.

³ Generally, the breach of a statutory duty, whether the act is one of omission or commission, is negligence, *per se*. *Diamond Block Coal Co. v. Cuthbertson* (Ind. App. 1908), 67 N. E. Rep. 558; *Brower v. Locke* (*Id.*), 67 N. E. Rep. 1015.

⁴ The Appellate Court of Illinois has held that the statute was not intended to place an absolute duty of keeping the roof of a mine perfectly safe. *Con. Coal v. Scheller*, 42 Ill. App. 619. *Horner's Rev. St. Ind.* 1897, requiring boss to visit mine every other day and see that props are

held, that employees in mines subject to the provisions of statutes governing the methods or appliances provided by the legislature, for the safety of the men employed, have a right to expect a compliance with the law, in this regard, on entering or remaining in such service and that for a violation of the statute, resulting in an injury to an employee, where other circumstances, excusing the defendant, do not appear, the employer is liable in damages.¹

§ 329. Right not affected by subsequent repeal of statute. — Where a right of action for the negligent violation of a statute is fixed, by reason of such violation and a consequent injury, traceable to a breach of the statutory

safe and roof trimmed, is not intended as placing the liability of an insurer on the employer, but the neglect of the act, makes him *prima facie* liable, in case of resulting injury. *Wooley Coal Co. v. Bracken*, 30 Ind. App. 624; 66 N. E. Rep. 775.

¹ "Under Act 1895, § 4, requiring all mines in which men are employed to be examined each morning by an authorized agent of the proprietor, the duty of making an examination each morning and having a written report made is cast on the proprietor of the mine, and the miners have a right to act on the theory that such proprietor has complied with the law." *Spring Valley Coal Co. v. Rowatt*, 96 Ill. App. 248. Hurds' R. S. Ill. of 1901, (page 1216, Sec. 21), requires all operators of coal mines to provide a place of refuge, upon all gravity or inclined roads running into the mine and for an injury resulting from neglect of this provision of the statute, the owner is liable in damages. *Brookside Coal Co. v. Hajnal*, 101 Ill. App. 175. Nor can the statutory duty be avoided because the owner has a double track road, instead of a single-rail, as the statute cannot be given so narrow a construction. *Brookside Coal Co. v. Dolph*, 101 Ill. App. 169. "Under Ballinger's Ann. Codes & S'. § 3178, providing that 'the owner of any coal mine shall keep a sufficient supply of timber at any such mine where the same is required for use as props, so that the workmen may at all times be able to properly secure the workings from caving in, and shall send down into the mine all such props when required, the same to be delivered at the entrance of the working place,' the failure of the owner of a mine to furnish props and timbers when called for by a workman is negligence rendering such owner liable for injury thereby resulting to the workman." *Green v. Western American Co.* (Wash. 1902), 70 Pac. Rep. 310.

duty imposed, the plaintiff's right of recovery will not be affected by a subsequent repeal of the statute, for the right, having become vested under such statute by reason of the mine owner's wrongful violation of the statute and an injury, dependent thereon, the establishment of a different standard of duty, or the termination of that duty that existed at the time of the injury, would not affect the right acquired thereby.¹

§ 330. **Violation of statute must occasion injury.** — The rule of approximate cause applies to causes of action based upon violations of statutory duty, the same as it does to violations of common law obligations, and before the plaintiff can recover, he must, generally, show a connection between his injury and the alleged breach of the statutory duty relied on. Without such a showing, the plaintiff would fail to show that the violation of the statute was the approximate cause of his injury, and, in such case, his action ought to fail.² In some jurisdictions, notably in Illinois, however, this rule as to actions for violation of the miner's statutes, is not enforced but it is held that a mere violation of the statute, without proof that it was the direct cause of the injury, is sufficient to enable the plaintiff to recover, in the absence of a showing that the injury was not caused by the breach of the statutory duty imposed.³ This construction seems to violate the rule under

¹ A violation of Indiana statute of March 6, 1885, to furnish props, is not affected by the subsequent repeal of the act, as the right vested by the prior act is left intact and is not affected by the subsequent act. *Hochstetler v. Maurier Coal Co.* (Ind. App.), 35 N. E. Rep. 927.

² *Davis v. Miller*, 109 Ala. 589; *Dresser Emp. Liab.*, pp. 248, 249, Sec. 51; *Bodell v. Coal Co.*, 25 Ind. App. 654; *Victor Coal Co. v. Muir*, 20 Colo. 320.

³ "Under Mines Act (Hurd's Rev. St. 1899, c. 98), § 83, providing that for any willful violation thereof a right of action shall accrue to the party injured for any direct damages sustained, it is not necessary to warrant

which the burden of establishing his case, is imposed upon a party holding the affirmative of an issue and also the rule of approximate cause, in all character of negligence cases.¹

§ 331. Same — Statutes respecting “ways, works and machinery.” — For a failure to provide the character of

a recovery that the injury was caused directly by a violation of the act, as the word ‘direct’ does not pertain to the cause of the injury, but to the effect of it.” *Willis Coal & Mining Co. v. Grizzell*, 100 Ill. App. 480. The Appellate Court of Illinois has held that it is not essential to show a connection between a violation of the statute and an injury, but if an injury occurs contemporaneous with such violation, a verdict will be upheld, unless there is a total failure of proof as to the cause of the injury. *Jupiter Coal Min. Co. v. Mercer*, 84 Ill. App. 96.

¹ No action under the prop statute of West Virginia will lie, where the evidence establishes that the falling of the slab was due to its being struck by the injured servant. *Massie v. Coal Co.*, 41 W. Va. 620; 24 S. E. Rep. 644. To acquire a right of action under Pa. Act 1885 (P. L. 217, Sec. 15), for employing a boss, who has no certificate of competency, this must occasion the injury. *Christner v. Coal Co.*, 146 Pa. 67; 28 Atl. Rep. 221. “A coal mining company is not liable for the death of a miner because it had failed to comply with Pa. Act June 2, 1891, art. 7 (P. L. 189), providing that for injury to a person caused by the violation of the act by the owner, operator, or foreman of a mine, a right of action shall accrue, in that it failed to comply with the requirement of the statute imposing on it the duty to maintain an ambulance at its mine, where there is no evidence to show that such failure was the cause of the death of the miner, except of a woman who dressed the latter’s wounds, and who could give no reason for believing that she could have saved his life if he had been removed to his home immediately.” *Davis v. Pennsylvania Coal Co.*, 58 Atl. Rep. 271; 209 Pa. 153. “Act Tenn. 1881, c. 170, requires a mine owner to employ a competent overseer, who shall see that all loose coal, slate, or rock overhead is carefully secured against falling, and requires a miner having charge of a working place to keep the roof properly propped. *Held* that, irrespective of whether a miner was charged with keeping the roof of an entry room or neck propped, there could be no liability under the statute where the evidence showed no negligence of the overseer, but that he had examined the roof before the accident, and that afterwards the miner worked under it for 10 or 14 hours, undermining the support of it, without calling the overseer, as he was entitled to do.” *Heald v. Wallace*, 71 S. W. Rep. 80.

“ways, works and machinery,” specified in the different statutes of this description, the employer is generally liable in case of a resulting injury to an employee.¹ And where the language of the statute contemplates a liability for a failure to comply with the provisions of the statute, in case of a negligent violation by any person intrusted by the employer, with a performance of its provisions, the employer would be liable for the neglect of such a person.² The court should, usually, determine the application of such statutes to a given case, and, where the evidence is all one way, should also judicially decide whether or not there was a violation of the statute;³ but where the evidence as to application or compliance with the statute is in doubt, the fact should be submitted to the jury, under proper instructions limiting the application of the statute and its subject-matter to the different phases of the case on trial.⁴ Where the language of the statute contemplates a liability, however, only in case of the personal negligence of the employer, then the neglect of a person in his employ would not render him liable, and this, like the issues as to the application of the act and a compliance with its provisions, in doubtful cases, would be a fact to determine, from all the evidence in the case before the court.⁵

¹ *Dresser Emp. Liab.*, pp. 249, 253; *Klein v. Garvey*, 87 N. Y. S. 998; *Durst v. Steele Co.*, 173 Pa. St. 162; 33 Atl. Rep. 1102.

² *Toomey v. Donovan*, 158 Mass. 234.

³ *Whitcomb v. Oil Co.*, 153 Ind. 513; *Mary Lee Co. v. Champbliss*, 97 Ala. 171; *Hillyear v. Dickinson*, 154 Mass. 502.

⁴ *Tenn. Coal, Iron &c. Co. v. Herndon*, 100 Ala. 451; *Dresser Emp. Liab.*, pp. 254, 257.

⁵ *Toomey v. Donovan*, 158 Mass. 234; *Dresser Emp. Liab.*, pp. 249, 250. A temporary derrick, in a quarry, comes within Massachusetts Statute (1887, Ch. 270, Sec. 1), in regard to “ways, works or machinery,” requiring such derrick to be kept reasonably safe, etc. *McMahon v. McHale*, 174 Mass. 320; 54 N. E. Rep. 854. Under the N. Y. Law (1897, p. 461) regulating the construction of scaffolds, on which men are required to work, over 20 feet from the ground, providing for a safety

§ 332. What constitutes "plant," within meaning of statute. — Under statutes rendering an employer liable for any defect in the "ways, works, machinery or plant," where his employees are engaged to work, anything is usually held to be within the definition of the terms used in

rail and bolts and braces, it is held, that a fall of the scaffold, unexplained, raises a presumption that the statute was not complied with. *Johnson v. Roach*, 82 N. Y. S. 203; 83 App. Div. 351; 13 N. Y. Ann. Cas. 86. An unsuitableness of "ways, works and machinery," under Mass. St. 1887, Chap. 270, although perfect of their kind, is a violation of the act and such negligence as to justify a recovery. *Geloneck v. Dean. Steam &c. Co.*, 165 Mass. 202; 43 N. E. Rep. 85. But see, *contra*, in Pennsylvania, *Durst v. Steele Co.*, 173 Pa. St. 162; 33 Atl. Rep. 1102. "An employer who directed a servant not to adjust the guards on a planing machine which he was operating, in changing from one class of work to another, violated Laws 1897, p. 480, c. 415, Sec. 81, providing that all machinery shall be properly guarded." *Klein v. Garvey*, 87 N. Y. S. 998. "The labor law (Laws 1897, p. 467, c. 415, Sec. 8) provides that a person employing or directing another to perform labor of any kind, in the erection, repairing, or alteration of a house, building or structure, shall not furnish or erect for the performance of such labor any scaffolding which is unsafe or improper. An upright boiler stood outside of a building, entirely unprotected and unsheltered, and was connected with a boiler inside of the building by a pipe; the boiler on the outside having been used temporarily for washing out the boiler inside the building. It became expedient to disconnect and remove the outside boiler, and some planks were placed on cleats and horses in such a position that plaintiff could reach the pipe which entered the building, and, while standing on the planks, one of them tipped up with him, whereby he sustained injuries. *Held*, that the platform was not a scaffolding, within the statute." *Conley v. Lackawanna Iron & Steel Co.* (N. Y. Sup. 1904), 88 N. Y. S. 128; 94 App. Div. 149. *Hurd's Rev. St. Ill.* 1901, p. 1202, provides for the ventilation of coal mines and automatic doors, with an attendant to open and close the doors, when cars are hauled through. The object of the act is held to be not only to ventilate the mine, but to protect workmen passing through. *Himrod Coal Co. v. Stevens*, 208 Ill. 115; affirming, 104 Ill. App. 639; 67 N. E. Rep. 389. An employee injured as the result of a misspent blast, cannot claim to have been injured as a result of a violation of the Mass. Stat. 1887, Ch. 270, making an employer liable for injuries from a defect in the "ways, works, or machinery" of his plant, as such injury is not within the statute. *Welch v. Grace*, 167 Mass. 590; 46 N. E. Rep. 387.

the statute, with which the employee is generally required to work, whether included within the one or the other of the specifications named in the statute. Accordingly, in a late Alabama case, under a statute making the employer liable for any injury to his employees on account of a defect in the "way, work, machinery or plant," connected with or used in the business,¹ pieces of timber commonly used by blast furnace companies to scotch hot pots of molten metal with, to hold them in position on inclined tracks of the employer, on slag piles, while they cool, are held to be a part of the employer's "plant."²

§ 333. **Statutes requiring proper ventilation of mine.** — The great frequency and disastrous effects of accidents from impure air and accumulated noxious gases and vapors, in coal mines, upon the health and lives of employees, has led the general government and the legislatures of most of the mining States, to pass statutes requiring appliances and machinery to insure the proper ventilation of such mines.³ Under the Federal statute (26 Statutes at Large, 1104, Chapter 564), the mine owner, upon the public mining land of the United States, is required to furnish, by proper appliances, at least fifty-five cubic feet of pure air per second, for every fifty men at work in mines over one hundred feet, which shall be forced to the face of each working place, so as to dilute and render harmless the poisonous gases, likely to accumulate in such mine.⁴ Statutes of like import in most of the States have been enacted, with similar or dissimilar provisions as to the details

¹ Alabama Code, 1896, Sec. 1749.

² *Bloss-Sheffield Steel & Iron Co. v. Mobley*, 139 Ala. 425; 36 So. Rep. 181.

³ See Chapter on *Gas Explosions in Mines*, with citation to statutes.

⁴ Act Congress, approved, March 3d, 1891, 26 St. L. 1104, Chap. 564.

for the enforcement of the statute and the methods employed to free the mine from noxious gases and vapors.¹ A violation of the ventilation statutes, generally constitutes such negligence as to render the employer liable, in case of injury resulting therefrom;² the duties imposed by the law cannot, generally, be delegated so as to relieve the employer from the statutory duty imposed,³ but, as in other actions for negligence, before a liability under such statutes will result, it is necessary to establish that the violation of the statute was the approximate cause of the injury complained of.⁴

§ 334. Same — Compliance with statute test of liability. — Where the degree of care required is not specified in a given statute, but only a general course as to a method or appliance, indicated for the direction of an employer, then, in some cases, it is held that a reference to the common law is proper for the degree of care required to ascertain if a substantial compliance with the statute has been had. This was held, in Ohio, with reference to

¹ Ill. Laws, 1883, p. 114; Pa. Act, March 31, 1870; W. Va. Code, 1891, p. 999; Iowa Code, Sec. 2488; Ill. Act, July 1, 1888; 35 and 36 Vict., Chap. 73; Laws Wash. 1891, Chap. 81; R. S. Ohio, Sec. 301; R. S. Mo. Secs. 8801, 8802.

² *Mosgrove v. Zimbleman Coal Co.* (Iowa), 81 N. W. Rep. 227; *Graham v. Newburg Orrel Coal Co.*, 38 W. Va. 273; 18 S. E. Rep. 584; *Muddy Valley Min. Co. v. Phillipps*, 39 Ill. App. 376; *Hall v. Hopwood*, 49 L. J. M. C. N. S. 17; 15 Mor. Min. Rep. 42; *Knowles v. Dickinson*, 2 El. & El. 705.

³ *Sommer v. Carbon Hill Coal Co.* (Wash.), 89 Fed. Rep. 54.

⁴ *Coal Run Co. v. Jones*, 127 Ill. 379; 20 N. E. Rep. 89. Under 23 and 24 Vict., Chap. 151, so much of the mine must be constantly ventilated as to render the working places safe. *Brough v. Homfray*, L. R. 3 Q. B. 771; 37 L. J. M. C. N. S. 177; 15 Mor. Min. Rep. 6. See, also, *Hughes v. Clyde Coal Co.*, 19 Sc. Sess. Cas. 343, Statute, 18 and 19 Vict., Chap. 108, requiring constant ventilation, if a mine "be worked," is operative, although no work is done from Saturday un'til Monday, and the ventilation must continue during this period. *Knowles v. Dickinson*, 2 El. & El. 705; 29 L. J. M. C. N. S. 135.

the proper construction of the prop statute.¹ Where a specific course of conduct, or a given method or appliance is specified, in the statute, however, then the only test of a compliance with the statute, would be a reference to the requirements of the law itself and no other standard of care would be material to the inquiry.² This is the rule adopted in the case of *Deserant v. Cerillos Coal Railroad Company* by the United States Supreme Court, where, in the course of the Court's opinion, it is said: "The act of Congress does not give to mine owners the privilege of reasoning on the sufficiency of appliances for ventilation, or leave to their judgment the amount of ventilation that is sufficient for the protection of miners. It prescribes, on the contrary, that the mine shall be kept clear of standing gas. This is an imperative duty and the consequence of neglecting it cannot be excused because some workmen may disregard instructions." Speaking of the instruction, given by the trial court of New Mexico, the Supreme Court then holds it error, because "it made the duty of the mine owner relative, not absolute, and its test what a reasonable person would do, instead of making the test and measure of duty, the command of the statute."³

§ 335. Same — Construction of ventilation statutes. — Generally, the violation of the ventilation statute of a State will constitute negligence sufficient to render the employer liable, in case of a resulting injury.⁴ It

¹ *Con. Coal Co. v. Bokamp*, 181 Ill. 9; 54 N. E. Rep. 567; *Cecil v. Amer. Steel Co. (Ohio)*, 129 Fed. Rep. 542.

² *Deserant v. Cerillos Coal Co.*, 178 U. S. 409; 44 L. Ed. 1127.

³ *Ante, idem.*

⁴ *Graham v. Coal Co.*, 88 W. Va. 273; 18 S. E. Rep. 584. A violation of the Iowa statute, requiring ventilation, makes out a prima facie case of negligence, in case of an injury due to a violation of the statute. *Mosgrove v. Zimbleman Coal Co.*, 81 N. W. Rep. 227.

is generally required, however, that the failure to comply with the statute must occasion the injury complained of; ¹ if the injury would have occurred, notwithstanding a violation of the statute, the plaintiff, generally, cannot recover,² and just what will constitute a violation of the statute, where it is in doubt, would be a question of fact for the jury.³ It is held, in Washington, that the stoppage of ventilation machinery a day or so, may or may not be negligence, according to the surrounding facts and circumstances; ⁴ In Alabama, stopping the machinery for a short time will not constitute negligence, as a matter of law,⁵ and for just what acts or omissions of employees the employer is held responsible, the different mining States have established different rules. In Washington, the mine owner is held liable for a failure to keep an air passage open, regardless of who closed it; ⁶ but, on the contrary, under the Pennsylvania Mine Ventilation statute, evidence that the fans for ventilation purposes were not run day and night and that an explosion of gas occurred, killing a miner, does not establish such negligence as to render the employer liable, as the statute commits the care of the ventilating fans to a foreman, over whom the mine owner has no control and the employer would not be responsible for his neglect, if he was

¹ *Coal Run Co. v. Ives*, 127 Ill. 379; 20 N. E. Rep. 89.

² *Krause v. Morgan*, 53 Ohio St. 26; 40 N. E. Rep. 586.

³ *Mosgrove v. Zimbleman Coal Co.*, 81 N. W. Rep. 227; *Deserant v. Cerillos Coal Co.*, 178 U. S. 409; 44 L. Ed. 1127.

⁴ In Washington the stoppage of ventilation machinery from Saturday until Sunday, is not negligence, as a matter of law, where it is not run for several hours before an accident. *Morgen v. Carbon Hill Coal Co.*, 6 Wash. 577; 34 Pac. Rep. 152.

⁵ Merely stopping a fan in a mine for a short time, is not such negligence, as a matter of law, on the part of foreman, in Alabama, as to render his employer liable, in case of injury. *Drennan v. Smith*, 115 Ala. 396; 22 So. Rep. 442.

⁶ *Czareki v. Seattle, etc. Co.*, 30 Wash. 28; 70 Pac. Rep. 750.

guilty of neglect in not having the fans run, or the air course properly directed.¹ But under the statute of Tennessee (Act 1881, Sec. 7), which provides the amount of pure air that must be supplied to render a mine safe, if a mine owner fails to comply with the statute and a miner is injured, the employer will be liable in damages, although the injury resulted from his own neglect and that of a fellow-servant, who had taken a lighted, open lamp into the gaseous chamber of the mine.²

§ 336. **Same — Status of “ fire boss.”** — The liability of the mine employer is often made to depend upon the exact status of his “ fire boss,” employed under the statutory provisions and whether he is regarded as a vice-principal or fellow-servant, for whose negligence he would not be responsible. Under the provisions of the Mine Ventila-

¹ Hall v. Simpson, 203 Pa. St. 146; 52 Atl. Rep. 4.

² Russell v. Dayton Coal Co., 70 S. W. Rep. 1. The West Virginia statute requires proper ventilation and circulation to render harmless the dangerous gases in coal mines and the employment of a competent fire boss, to inspect the working places, and a mining boss, to keep watch over the ventilating apparatus and to see to the proper conduct of the work and that props and timbers are supplied, when required. It is held, under this statute, that in case of an injury, the violation of the act is negligence, *per se*. Graham v. Newburg Orrel Coal Co., 88 W. Va. 273. Under the Washington statute, in regard to a proper ventilation of a mine, the owner is liable for a failure to keep open a chute necessary to supply air, regardless of who closed it, or failed to open it. Czareki v. Seattle, etc., Co., 30 Wash. 288; 70 Pac. Rep. 750. “In an action for the death of a coal miner from suffocation caused by a fire in the mine, evidence of defendant’s negligence in permitting combustible materials to remain in the mine, which were subject to be ignited from the miners’ open lamps, held sufficient to justify a verdict in favor of plaintiff.” Utah Savings & Trust Co. v. Diamond Coal & Coke Co., 73 Pac. Rep. 524. A mining company, in Illinois, which fails to follow the directions of the State Mine Inspector, with reference to the sprinkling of roadways in the mine and the spreading of a canvas sheet, by reason of which an explosion results, is liable for such an injury. Riverton Coal Co. v. Shepard, 207 Ill. 395; 60 N. E. Rep. 921.

tion Act, of Pennsylvania (March 3, 1870), the "mining boss," required by the act, and the miners, employed to work in the mine, are fellow-servants, and if the requirements of the statutes as to their selection, are complied with and the employer is guilty of no negligence in their selection, he would not be responsible for the death of a miner, due to the negligence of such "mining boss."¹ A similar construction of the English statute "Regulating Coal Mines" (35 and 36 Vict. Ch. 76) was adopted in England and where a miner, employed in a colliery, was killed by an explosion of "fire-damp," it was held that "the fact that the manager was appointed pursuant to the act, did not put him in any different position from what he would have held, had he been simply appointed manager," and that he was a fellow-servant with the deceased and the defendants were, therefore, not liable to the representatives of the deceased, for his death.² But under the Kansas statute (Laws, 1897, Ch. 159), requiring the mine owner to employ a competent "fire boss," whose duty it shall be to inspect the working places, with a safety lamp, the "fire boss" so employed is held to be a vice-principal and not a fellow-servant, for whose negligence the mine owner is responsible.³ The Pennsylvania rule has been adopted in West Virginia, Colorado and Washington, and for the negligence of the "fire boss" in those States there is no resulting liability upon the part of the employer.⁴

¹ Delaware & Hudson Canal Co. v. Carroll, 89 Pa. St. 374; 10 Mor. Min. Rep. 47; Lehigh Valley Co. v. Jones, 86 Pa. St. 432; 10 Mor. Min. Rep. 80.

² Howells v. Landore Steele Co., L. R. 10 Q. B. 62.

³ Schmalstieg v. Coal Co., 65 Kan. 753; 70 Pac. Rep. 388; 39 L. R. A. 707.

⁴ Under the Pa. statute, a "fire boss" and miner are fellow-servants. Lineoski v. Coal Co., 157 Pa. St. 153; 27 Atl. Rep. 577. And this was also held to be the status of the "fire boss" and miner, under the Wash-

§ 337. **Statutes requiring escapement shafts.** — To protect the health of miners employed in coal mines and to insure their safety, some of the mining States have enacted laws, requiring the construction of escapement shafts, in all mines of a certain depth or where a given number of men are employed.¹ The Appellate Court of Illinois held that the statute of that State, requiring the construction of escapement shafts, was not for the benefit of the mine owner or operator, but to protect the health and insure the safety of the miners at work in the ground, and, it was accordingly held, under the statute, that a court had no power to direct a mine owner to leave open the passages, between his own and an adjoining mine, so that an escapement shaft, constructed by him, would serve both of the mines.² The Pennsylvania statute was held, by the Supreme Court of that State, not to apply to a mine in preparation for the working of a seam of coal, not yet mined,³ but where the mine is in full operation, and no escapement shaft had been constructed, as required by the statute, it would be immaterial that the fire which occasioned the injury in question was purely accidental and arose without fault of the owner, a liability would result, just the same as if it had been caused by his negligence,

ington statute, in *Morgen v. Carbon Hill Co.*, 6 Wash. 577; 34 Pac. Rep. 152; *Williams v. Coal Co.*, 44 W. Va. 599; 30 S. E. Rep. 107; 40 L. R. A. 812. A mine boss, employed under statute, and miner are fellow-servants in Colorado. *Colo. C. & I. Co. v. Lamb* (Colo. App.), 40 Pac. Rep. 251. A mine boss, employed under West Virginia Code (1891, App., p. 995), is a fellow-servant with the miners to such an extent that the employer is not liable for an injury from his negligence. *Williams v. Thacker Coal Co.*, 44 W. Va. 599; 40 L. R. A. 812; 30 S. E. Rep. 107.

¹ Ill. St. 1877, Sec. 3; Ill. Act May 28, 1879, Sec. 3; Pa. Act March 3, 1870. The Pennsylvania statute, requiring two shafts for each seam of coal, took effect immediately. *Commonwealth v. Conyngham*, 96 Pa. St. 99.

² *Loose v. People*, 11 Ill. App. 445.

³ *Haddock v. Commonwealth*, 103 Pa. St. 243.

for the violation of the statute and a resulting injury would be sufficient proof of a violation of duty to sustain a verdict.¹

§ 338. Statutes requiring mine to be fenced.—In many of the mining States statutes have been passed requiring the fencing of shafts, so as to prevent employees from falling into the mine, while about their work. The Illinois act of 1872 required the top of each shaft to be securely fenced by vertical or flat gates, properly covering and protecting the area of the shaft. A company failed to comply with the statutory requirement in this regard and an employee fell into the shaft and was killed. The defendant was held liable and the court distinguished the neglect of the employer, in failing to comply with an express statutory requirement, from the negligence of a fellow-servant of the deceased employee.² Under the Pennsylvania statute, (1870) requiring the mining boss to have the main doors, or entrances to rooms and drifts, attended and securely guarded to prevent their being left open, the statutory test of duty must be complied with and

¹ Wesley City Coal Co. v. Healer, 84 Ill. 126.

² Bartlett Coal Co. v. Roach, 68 Ill. 174; 10 Mor. Min. Rep. 682. Violation of the Illinois statute requiring the fencing of mines, is not relieved by the contributory negligence of an employee. Catlett v. Young, 148 Ill. 74; 82 N. E. Rep. 447. But this is not the better doctrine or generally accepted rule, as the violation of the statute must be the proximate cause of the injury, and if the plaintiff's negligence was the cause he ought not to recover. See Dresser Emp. Liab., Sec. 51, *et sub.* Under the Indiana statute, requiring the fencing of the shaft of a mine, an employee, engaged as a blacksmith, does not assume risks of dangers from a violation of the statute. Brazil Block Coal Co. v. Hodlet, 27 N. E. Rep. 741. "The failure to fence off an unused part of a mine, as required by statute, does not render the owner of the mine liable for the death of a miner killed by an explosion therein, where he was sent into such unused part to perform certain work therein, and the failure to fence it off did not in any degree tend to cause the explosion." Grant v. Acadia Coal Co., 84 N. S. 319.

the mine boss has no discretion to perform in the premises, but the employer will be liable for a failure to comply with the statute.¹ But under the Iowa Code, requiring that safety gates shall be maintained at the opening of the shaft of a mine, the Supreme Court of that State holds that the object of the act is to prevent the involuntary entrance or falling of a person into the mine, and not that there should be an entire and complete covering of the entire surface of the opening of the shaft, so to this extent a substantial compliance with the statute will prevent a liability for an injury predicated thereon.²

§ 339. **Statutes against employment of children.**— Many States have wisely provided, by statute, against the employment of children of tender years, in mines, factories, and around dangerous machinery or appliances, and, generally, for a violation of such statutes and a resulting injury to one employed in violation of the statute, the employer would be liable, in damages, for such injury. In Pennsylvania, a liability was predicated under the statute of March 3, 1870, for an injury to a boy of thirteen, by falling into a pair of rollers, used to crush coal. The act in question required the fencing of all machinery where boys were required to work; the rollers were covered by a box, open at the top, with a board placed over the opening, when in use. Some one of the plaintiff's co-employees had removed this board and he fell into the rollers, injuring himself very badly. The court denied a recovery and held that the employer had performed his whole duty, under the statute, in providing a covering for the rollers; that the injury to the plaintiff was due to the negligence of a fellow-servant and he was also guilty of such contrib-

¹ *Commonwealth v. Reynolds*, 1 Kulp. 218.

² *Jacobson v. Smith* (Iowa, 1904), 98 N. W. Rep. 773.

utory negligence as to prevent his recovery.¹ In New York, such statutes are held to be legislative determinations that a child of the years mentioned in the statute cannot be guilty of contributory negligence.² In Tennessee, a mine owner who employs a child under the age named in the statute is guilty of negligence as a matter of law,³ but in Michigan, as in Pennsylvania, the contributory negligence of the child will prevent a recovery, even though he is employed in violation of the terms of the statute, as this would not, in such case, be held to be the approximate cause of his injury.⁴

§ 340. Statutes regarding scaffolding. — In New York, in all cases, where scaffolding is required, the employer is under the statutory duty to construct such scaffolds in a reasonably safe and proper manner.⁵ Prior to the enactment of this statute, it was held, in that State, that there

¹ *Honor v. Allbright*, 93 Pa. St. 475; 11 Mo. Min. Rep. 6.

² "Laws 1897, c. 415, § 70, prohibiting the employment of a child under the age of 14 years in any factory, is a determination, in effect, that a child of that age does not possess the judgment and discretion necessary for the pursuit of a dangerous work, and is not, as a matter of law, chargeable with contributory negligence." *Marino v. Lehmaier*, 66 N. E. Rep. 572; 173 N. Y. 530.

³ The employment of a boy, under twelve years of age, in violation of the Tennessee statute, preventing the employment of such children in mines, will render the employer liable in damages, in case of injury to the boy, as the violation of the statute is negligence *per se*. *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458; 32 S. W. Rep. 460; 30 L. R. A. 82.

⁴ A violation of the Michigan statute against the employment of children under fourteen, will not render an employer liable for an injury to a child from scuffling with another boy and falling into dangerous machinery. *Borck v. Mich. B. & N. Works*, 111 Mich. 129; 69 N. W. Rep. 254. The statutes of West Virginia (Code W. Va. 1899, p. 1055), provides that no minor, 12 years of age, shall be employed in any mine, factory, or workshop. The statute also makes it a misdemeanor on the part of any guardian of such child, to let him work in such forbidden mine, factory, etc.

⁵ Law N. Y., 1897, Chap. 415.

was no liability for an injury from a defective scaffold, built by an employee and his fellow-servants,¹ but the effect of the statute is to render the employer liable, although he may have furnished proper appliances and material to his employees, if the scaffold itself was not properly and safely built.² The fact that the employee who built the scaffold, and the injured servant, are fellow-servants, will not relieve the employer of the result of the former's negligence in building the scaffold, under such a statute;³ the statute does not apply, however, to any preliminary work or structure, which could not be considered as a scaffold, but only to the completed structure, as such,⁴ and whether or not it was reasonably safe, is a jury question.⁵

§ 341. **Statutes requiring props and timbers.** — On account of the frequent injuries in mines from falling slabs and bowlders, most of the mining States have enacted laws requiring the mine owner to furnish his employees with a sufficient supply of props or timbers for the roof and to send them down into the mine. The Missouri statute (1899, Sec. 8822) makes it the duty of the mine owner, to "keep a sufficient supply of timber, when required to be used as props," and to "send down all such props, when required." The Supreme Court of the State construed this statute, as it originally stood, by requiring a request for props, on the part of the miner, before a liability under the statute would result.⁶ The Kansas City Court of Appeals holds that the

¹ *Banzhaf v. Ludwig*, 28 Misc. 496; 59 N. Y. Sup. 535.

² *Stewart v. Ferguson*, 60 N. Y. Supp. 429; *Healy v. Burke*, 71 N. Y. Supp. 1027.

³ *Kuss v. Fried*, 66 N. Y. Supp. 487.

⁴ *Pursley v. Edge Moor Works*, 168 N. Y. 539; 60 N. E. Rep. 1119.

⁵ *McLaughlin v. Eldlitz*, 64 N. Y. Supp. 193; 50 App. Div. 518.

⁶ *Leslie v. Rich Hill Coal Co.*, 110 Mo. 31. Rev. St. 1899, § 8822, requiring the owner of a mine to keep a sufficient supply of timber, when required to be used as props, so that the workmen may at all times be able

word "required" is used in the sense of "needed" and that a request is not essential, if the necessity for the props existed.¹ The Federal Court, for the Western District of the State, holds that there is no liability under this act, if a sufficient supply of timbers were supplied by the mine owner and that to state a cause of action, under the statute, it is essential to negative the clause of the statute placing such a duty on the owner, and that a mere allegation of neglect to timber the mine, when necessary, is insufficient to state a cause of action, under the statute.² In Washington, by Ballinger's Annotated Code (Sec. 3178), the mine owner is required to keep a sufficient supply of timber for props and to send down such timbers when required. A failure to supply such timber, on request of the workmen, is held to subject the mine owner to damages, in case of an injury therefrom.³ Under the Illinois statute, it is not sufficient for the mine owner to supply the props, but he must have

to properly secure the workings from caving in, is not satisfied by furnishing what may be deemed ordinarily sufficient timber; and the term "properly secure" does not mean reasonably safe or absolutely safe, but such security as a reasonable person would afford, commensurate with the threatened danger. *McDaniels v. Royle Min. Co.* (Mo. App. 1905), 85 S. W. Rep. 679. See also, chapter *Injuries from Failure to Furnish Timbers*.

¹ *Bowerman v. Lackawana Co.*, 98 Mo. App. 308; 71 S. W. Rep. 1062. For a construction of the Missouri statute, with reference to the parties to the action, see chapter *Parties to Actions*.

² *Cole v. Mayne*, 122 Fed. Rep. 836. Under the Missouri statute, requiring props, the Kansas City Court of Appeals, recently held that an instruction requiring the jury to find that props were essential and that a request had been made therefor, by the miner, was properly refused. *Weston v. Lackawana Mining Co.*, 78 S. W. Rep. 1044. But see, *contra*, *Wojlak v. K. & T. Coal Co.* (Mo. Sup. Ct.) 87 S. W. Rep. 506.

³ *Green v. Western American Co.*, 30 Wash. 87; 70 Pac. Rep. 310. "Evidence examined in an action by a miner for damages resulting from rocks in the mine, and held that the question of his contributory negligence in continuing to work after the foreman had neglected to furnish the props called for was for the jury." *Green v. Western American Co.* 70 Pac. Rep. 310.

them, when required, at the "usual place," to be used; if a "request" for the timber can be fairly held to have been made, it is sufficient, under the statute, and the common law duty to keep the roof reasonably safe is the proper test as to the necessity for props, under the statute.¹ The Kentucky statute, making it a misdemeanor for any miner to fail to use the timbers, after they are furnished, only applies to one whose duty it is to use such timbers, and a failure to use timbers will not prevent a track layer from recovering.² Contributory negligence is held, in Tennessee, to prevent a recovery under the prop statute, by one who had himself undermined the unpropped roof.³ Under the prop statute of

¹ Nor is it a sufficient compliance with the Illinois statute that props were "somewhere in the mine." They must be at the "usual place." *Donk Bros. Coal Co. v. Stroff*, 100 Ill. App. 576. Under Hurd's R. S. Ill. 1899, ch. 93, Secs. 14 and 16, requiring props delivered, when requested, if the evidence fairly tends to show a request by the injured miner, for props, it is not error to refuse a peremptory charge to find for the defendant. *O'Fallon Coal Co. v. LaQue*, 198 Ill. 125; 64 N. E. Rep. 767; *Donk Bros. Coal & Coke Co. v. Stroff*, 200 Ill. 483; 66 N. E. Rep. 29. The Illinois statute, requiring props for the roof of the mine, has not superseded the common-law duty owed by the mine owner to keep the roof reasonably safe, where props were not required, or to an employee not named in the statute. *Con. Coal Co. v. Bokamp*, 181 Ill. 9; 54 N. E. Rep. 567.

² The requirements of Kentucky statute (S. c. 2732), making it a misdemeanor for any miner who is ordered to do so, to fail to prop or timber the roof of a mine, applies to those who perform these duties only and not to a track layer, who is injured by reason of a failure to comply with the statute. *Ashland Coal Co. v. Wallace*, 101 Ky. 626; 42 S. W. Rep. 744.

³ Under Tenn. Act 1881, Ch. 170, requiring the employment of a competent boss, whose duty it shall be to see that roof is trimmed or propped, the owner is not liable to an employee, who, after an inspection by the boss, himself undermined the support to the roof and permitted it to fall upon himself. *Heald v. Wallace*, 71 S. W. Rep. 80. "Hornor's Rev. St. Ind., 1897, § 5480m (Burns' Rev. St. 1894, § 7472), requires a mining boss to visit and examine every working place in the mine every alternate day, and see that it is properly secured by props, and that safety in all

Iowa,¹ the miner failing to prop the section of the mine that needs props is made guilty of a misdemeanor and the owner is required to send down, for the use of the miners, all such props, when required. In a recent case, which originated under this statute, it was held that the law did not apply to a miner engaged in sloping an entry of a coal mine, used to bring the coal to the surface, where such miner was not in control of the entry, as it was not his duty to keep the place of work in repair, as an incident to duty as a workman, but the place of work, so far as he was concerned, was completed, when his work began.² It is held, under this statute, that the miner must demand props, as a condition precedent to a liability on the part of the owner, for a failure to furnish the same.³

§ 342. Same — The Ohio and Illinois statute. — By the terms of the prop statute of Ohio,⁴ the miner is made guilty of a crime for not using timbers that the owner has furnished, and the owner is required to keep a supply of timber constantly on hand, and to deliver the same at the working place of the miners and the criminal liability of the miner is conditioned upon the compliance with his full duty, by the mine owner. The Supreme Court of the State holds that a liability on the part of the mine owner

respects is assured; and that all loose coal, etc., where miners have to travel, is carefully secured. *Held*, that such statute does not make the owner of a mine an insurer of the safety of the workmen, but only operates to render a failure to comply with its requirements actionable negligence." *Wooley Coal Co. v. Bracken*, 66 N. E. Rep. 775.

¹ McLain's Iowa Code, Secs. 2463, 2465.

² *Carson v. Coal Hill Coal Co.*, 101 Iowa, 224; 70 N. W. Rep. 185. A laborer at work on the entry to a coal mine, in Illinois, is held to be within the provisions of the statute of that State. *Mt. Olive & S. Coal Co. v. Herbeck*, 190 Ill. 89; 60 N. E. Rep. 105; affirming 92 Ill. App. 441.

³ *Oleson v. Maple Grove Coal Co.*, 115 Iowa, 74; 87 N. W. Rep. 736.

⁴ Revised Statutes Ohio, Sec. 6871, originally Act April, 1872.

results from a mere showing that the necessary timbers were not delivered at the working places, as required by the statute, and no request or notice, on the part of the miner, of the necessity for props, is required, as a condition to hold the owner liable for a violation of the statute.¹ Under the prop statute of Illinois, a petition merely averring a failure to furnish props and to timber the roof of the mine, without any additional allegation as to the necessity for props and a request therefor, is insufficient;² the miners should themselves demand props, when they are needed³ and not only should they demand timbers, but where the dimensions are particular for the work in which they are to be used, they should specify the dimensions needed, or they cannot complain of the dimensions of the timbers.⁴ Where props of a certain dimension are demanded, however, it is not a compliance with the statute to send down props that it will be necessary to splice;⁵ any workman in the mine is entitled to the provisions and protection of the statute⁶ and a sufficient demand will be found to have been made for props, where the evidence showed that for three successive days, prior to his injury, a miner had, according to custom, written upon a slate, in the mine, a request for props, which he had never received.⁷

¹ *Pittsburg & Western Coal Co. v. Estlevenard*, 58 Ohio St. 43; 40 N. E. Rep. 725.

² *Consolidated Coal Co. v. Young*, 24 Ill. App. 255.

³ *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 619.

⁴ *Sugar Creek Mining Co. v. Peterson*, 177 Ill. 324; 52 N. E. Rep. 75; reversing 75 Ill. App. 631.

⁵ *Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 833; 61 N. E. Rep. 385; affirming 95 Ill. App. 95.

⁶ *Mt. Olive & S. Coal Co. v. Herbeck*, 190 Ill. 89; 60 N. E. Rep. 105; affirming 92 Ill. App. 441.

⁷ *Donk Bros. Coal & Coke Co. v. Peten*, 192 Ill. 41; 61 N. E. Rep. 330; affirming 95 Ill. App. 193.

§ 343. **Same — The New York and Indiana acts.** — By the statute of New York,¹ it is made the duty of mine owners to properly timber the roofs and sides of each working place and not to permit any person to work in an unsafe place, or under dangerous material, except to make the place secure. Where a miner was killed, by reason of the fall of a pillar of talc, while he was at work in the defendant's mine and the evidence showed that the mine owner's superintendent had notice of the dangerous condition of the pillar and had provided props to use to secure the same but had failed to utilize them, at the time of the accident and that the sliding of the pillar resulted from the water seeping through the soft layers of the pillar, the evidence was held to show a liability of the mine owner, under this statute.² Under Burns' Revised Statutes 1894, of Indiana, Section 7472, requiring an inspection every alternate day, by the mining boss, to see that all airways are safe and no props are required, in order to insure the safety of the miners, an allegation that the mining boss, appointed by the mine owner, failed to inspect the mine, as required by the statute, and, without the knowledge of the plaintiff, a miner at work in said mine, the wall of the drift, between where the coal was mined, became so thin that a shot blew one of the walls down, upon the plaintiff, is held to state a good cause of action.³

§ 344. **Same — When willful violation of a statute necessary.** — Under the "prop statutes" of some of the mining States, before a neglect to comply with the statute can be predicated upon a failure to supply timbers or

¹ Laws 1897, Chap. 415, Sec. 122.

² *Tetherton v. United States Talc Co.*, 165 N. Y. 665; 59 N. E. Rep. 1131.

³ *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 1; 61 N. E. Rep. 236.

props, it is essential to show a willful violation of the statute. The statute, as it originally stood, in Missouri, required the element of willfulness, to constitute a violation of the statute and, as it thus stood, the Supreme Court of the State, gave effect to the legislative intent, from the use of the word "willful," by holding that it contemplated a known, intentional violation of the statute and that without a knowledge and an intentional violation of the act, that no cause of action thereunder could be shown.¹ A similar interpretation was given a similar statute, in Illinois² and this, it is taken, is the reasonable and proper construction of such statutes, and wherever an element of willfulness is necessary to be shown, it ought to be established only where a known and intentional violation of the statute appears.³

§ 345. What evidence of willfulness sufficient. — Under the Illinois statute, as it was originally passed, it was necessary that the mine owner should have willfully failed to comply with the provisions, with reference to in-

¹ *Leslie v. Rich Hill Coal Co.*, 110 Mo. 81. Under the Missouri "Prop Statute," as it was originally passed, making a willful violation alone actionable, an intentional disregard of the statute was essential to a recovery. *Leslie v. Rich Hill Coal Co.*, 110 Mo. 81; 19 S. W. Rep. 803. "The miners act is a police regulation, passed in obedience to a constitutional provision of this State, and a willful failure to obey the provisions of the statute has all the force of wanton and intentional injury in contemplation of law." *Donk Bros. Coal & Coke Co. v. Stroff*, 100 Ill. App. 576.

² *Niantic Coal Co. v. Leonard*, 126 Ill. 216; *Beard v. Skeldon*, 118 Ill. 584; *Wesley Coal Co. v. Healer*, 84 Ill. 123; *Hawley v. Dalley*, 18 Bradw. 391; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590.

³ *State v. Clark*, 29 N. J. L. 98; *Cone v. Beads*, 9 Gray, 298. The failure of a mine owner to construct an escapement shaft, as required by Ill. St. 2 Starr & C. Ch. 93, within a year after coal was mined, would be treated as a willful violation of the law. *Carterville Coal Co. v. Abbott*, 81 Ill. App. 279.

spections, ventilation, etc.,¹ and mere non-compliance was not a violation of the statute, sufficient to recover against the mine owner.² But proof of a knowledge, upon the mine owner's part, that the mine was not in a safe condition and a failure to comply with the statutory provisions, in Illinois, was held a sufficient proof of willfulness to justify a recovery³ and where the shaft had been constructed to a depth of two hundred feet and a year after coal was mined no escapement shaft was constructed, as required by the statute, this was a sufficient showing of willfulness, to justify a submission of the question to the jury.⁴ Gross negligence has also been held sufficient to justify the presumption of willfulness,⁵ and, generally, where there is proof of a consciousness that the statute has been violated, it is a jury question whether or not, the willfulness contemplated, exists.⁶ Willfulness is judicially held to be a conscious act of the mind and not a mere inadvertence,⁷ but a wrongful intent is not an element of willfulness and hence, the mine owner cannot testify to a lack of such intent upon his part, to disprove such willfulness.⁸ Mere proof of a want of ordinary care, how-

¹ Consolidated Coal Co. v. Carson, 66 Ill. App. 434; Odin Coal Co. v. Denman, 185 Ill. 413; 57 N. E. Rep. 192; 76 Am. St. Rep. 45; Springside Coal Min. Co. v. Grogan, 53 Ill. App. 60.

² Hawley v. Dailey, 13 Ill. App. 391.

³ Pawnee Coal Co. v. Royce, 184 Ill. 402; 56 N. E. Rep. 621; Bartlett Coal & Mining Co. v. Roach, 68 Ill. 174; Jupiter Coal Min. Co. v. Mercer, 84 Ill. App. 96; Girard Coal Co. v. Wiggins, 52 Ill. App. 69; Niantic Coal & Min. Co. v. Leonard, 126 Ill. 216; 19 N. E. Rep. 294.

⁴ Carterville Coal Co. v. Abbott, 81 Ill. App. 279.

⁵ Girard Coal Co. v. Wiggins, 52 Ill. App. 69.

⁶ Odin Coal Co. v. Denman, 84 Ill. App. 190; Muddy Valley Min. Co. v. Philipps, 39 Ill. App. 376.

⁷ Odin Coal Co. v. Denman, 185 Ill. 413; 57 N. E. Rep. 192; 76 Am. St. Rep. 45; 84 Ill. App. 190; Leslie v. Rich Coal Min. Co., 110 Mo. 81; 19 S. W. Rep. 308.

⁸ Odin Coal Co. v. Denman, *supra*.

ever, does not sustain the charge, under such a statute, of a willful disregard of the statute.¹

§ 346. Willful violation of Illinois mining act. — Under the coal mine statute of Illinois,² which makes the mine owner liable in damages for any injury to person or property of his employees, or for the "death, occasioned by any willful violation of this act, or willful failure to comply with any of its provisions," as construed by the Supreme Court of the State, a knowing and intentional failure to comply with the provisions of the act is a willful failure, within the meaning of the law, and it is not essential for the plaintiff to further show a wrongful or evil intent, in order to give a right of action for the death of a miner.³

¹ *Girard Coal Co. v. Wiggins*, 52 Ill. App. 69. Where the mine owner's inspector makes a careful examination and reports that the mine is safe, then the owner cannot be held for a willful violation of the law, but might be liable for common law negligence. *Himrod Coal Co. v. Schroa th*, 91 Ill. App. 234. "The failure of a mine owner, with notice, to remedy defective conditions in a mine, and the neglect of the mine examiner to report unsafe conditions, to mark the places, and make a report thereof, are conscious omissions, and therefore willful violations of the mining act of this State." *Riverton Coal Co. v. Shepherd*, 111 Ill. App. 294. "Under Mines Act (Hurd's Rev. St. 1899, c. 93), § 35, providing that for any willful violation thereof a right of action shall accrue to the party injured for any direct damages sustained, a mining company is liable for an injury caused by its violation of the statute, though the consequence of its violation could not have been foreseen as a result of its conduct." *Willis Coal & Mining Co. v. Grizzell*, 100 Ill. App. 480.

² *Laws Illinois*, 1899, p. 325, Sec. 33.

³ *Fulton v. Wilmington Star Mining Co.*, 133 Fed. Rep. 193. Under the coal mine law of Illinois (*Laws* 1899, p. 325, § 33), which makes a mine owner liable in damages for any injury to person or property or for death "occasioned by any willful violation of this act or willful failure to comply with any of its provisions," as construed by the Supreme Court of the State, a knowing and intentional failure to comply with the requirements of the act is a "willful" failure within its meaning, and a wrongful or evil intent is not necessary to give a right of action thereunder for the death of a miner." *Fulton v. Wilmington Star Min. Co.* (U. S. C. C. A. 11. 1904), 133 Fed. Rep. 193. And this is in accord with the holding

§ 347. **Statutes requiring safe passage-ways to and from mine.** — The statutes of many of the mining States, with a view of emphasizing and specializing the common law duty of the mine owner to provide a reasonably safe means of ingress and egress to and from the mine,¹ have enacted special statutes with reference to the maintenance and construction of reasonably safe and secure passage-ways leading to and from the working places in the mines.² As a general rule, a violation of such a statutory duty, will render the mine employer liable, the same as for an injury from a breach of any other statutory duty and after the mine has reached the stage at which the construction of a passage-way would be required, under the statute, an injury from a breach of statutory duty in this regard, will render the employer liable, whether the breach consists in a failure to construct the passage-way, in the first instance, or in failing to maintain it in a reasonably safe condition, subsequent to its construction. Accordingly, as held in a recent case, where the mine employer had complied with Starr & C. Ann St. (1902, p. 845, Ch. 93,) requiring a passage-way to be constructed fourteen feet wide, around the bottom of a shaft, but, by reason of a cave-in, such passage-way had become blocked and obstructed, so that it was necessary to crawl over the fallen rock and debris and this condition had existed for a period of six weeks prior to the injury of the plaintiff, from this cause, it was held to be no defense to the action that the mine was in the early stages of development, to which the statute ought not to apply, as the evidence showed that the passage-way could

of the State courts of Illinois. *Niantic Coal Mining Co. v. Leonard*, 126 Ill. 216; *Beard v. Skeldon*, 118 Ill. 584; *Wesley Coal Co. v. Healer*, 84 Ill. 128; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590.

¹ *White Mines & Mining Remedies*, Sec. 395, and cases cited.

² R. S. Ohio 1892, Sec. 6870, *et sub.*; R. S. Mo. 1899, Sec. 8814.

have been cleared and kept so, with a slight amount of extra work.¹

§ 348. **Statutes requiring certificates of mine managers.** — In some of the mining States, notably in Illinois,² there is a statute requiring the employment of mine managers, and such managers are required to obtain from a properly constituted board of examiners, a certificate of their competency and ability to act as a mine manager, and until such certificate is obtained, no such manager can act in such capacity in any of the mines within the State. This statute, like those requiring inspections and similar precautions to prevent injuries and accidents to the miners, is held to be a valid exercise of the police power by the legislature and not unconstitutional,³ nor would the fact that the courts hold that after the employment of such a manager, who is required to qualify under properly constituted commissioners, the employer is still liable for his neglect, render the statute unconstitutional, for he is regarded in the same light as any other vice-principal, after his qualification, the examination and qualification being but a preliminary process to ascertain the skill and ability of the employer's agent, which would not make him any the less his agent because of this preliminary safeguard, undertaken by the State.⁴

¹ *Chicago, Coulterville Coal Co. v. Fidelity & Casualty Co.*, 130 Fed. Rep. 957. Under Hurd's Rev. St. 1901, p. 1216, § 21, providing that on all single-track hauling roads, wherever hauling is done by machinery, and on all gravity and inclined planes in mines on which persons employed in the mines must travel, places of refuge must be cut in the side wall, a mining company cannot escape liability for an injury occasioned by the failure to provide such places of refuge, on the ground that there was a double track, and the statute did not require such places except on a single-track road where machinery was used. *Brookside Coal Min. Co. v. Dolph*, 101 Ill. App. 169.

² *Laws Illinois*, 1899, pp. 308, 309, Sees. 7, 8.

³ *Fulton v. Wilmington Star Mining Co.*, 133 Fed. Rep. 193.

⁴ *Fulton v. Wilmington Star Mining Co.*, 133 Fed. Rep. 193.

§ 349. **Statute requiring lights and signals.** — In most of the mining States statutes have been passed, requiring signals or other means of communication, between the bottom and the top of the shaft, to enable the miners to communicate with the person in charge of the hoisting apparatus. The statutes of Missouri and Illinois are illustrations of these acts, which are practically the same and require ample means of communication, between the bottom and top of the mine, with suitable means of signalling, between the bottom and top thereof.¹ The Illinois statute also requires a sufficient light, at the top of every shaft, to insure the safety of miners, getting on and off the cage.² Although not signalling at the time, a miner in the bottom of the shaft is held entitled to the provisions of the Missouri statute and can recover, for a failure to comply with the statute,³ but a miner in the derrick and in no way using the signals or being hoisted, at the time of his injury, is held not to be entitled to the protection of this statute.⁴ In Illinois, however, a miner in the “ tipple house,” above the shaft, is held to be entitled to the benefit of the statute of that State, and it was held to be a jury question whether the landing at the surface, or at such “ tipple house,” was the “ top of the shaft,” within the meaning of the law and whether or not the absence of a light was the approximate cause of the injury.⁵

§ 350. **Signalling — Hoisting apparatus.** — The statute of Missouri, like many similar provisions in other States,

¹ R. S. Mo. 1899, Secs. 8811, 8813; R. S. Ill. 1889, Chap. 98, Secs. 6, 8, 14.

² Sec. 6, R. S. Ill. 1889, Chap. 98.

³ *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62; 10 S. W. Rep. 484.

⁴ *Barron v. Missouri Lead and Zinc Mining Co.*, 173 Mo. 228.

⁵ *Odin Coal Co. v. Denman*, 185 Ill. 413; 57 N. E. Rep. 192; 76 Am. St. Rep. 43. The Illinois statute, requiring signals, applies to all coal mines in the State, regardless of the motive power in use. *Sangamon Coal Min Co. v. Wiggerhouse*, 25 Ill. App. 77; 122 Ill. 279; 13 N. E. Rep. 648.

requires every mine owner or operator to "provide suitable means of signalling, between the bottom and top" of the mine and "safe means of hoisting and lowering persons, in a cage, covered with boiler iron," the specific construction of the appliance being enumerated in the statute.¹ This statute is not attempted to be complied with in the lead and zinc mines of Missouri; its application to such mines would be extremely impractical and the State officers whose duty it is to see to the enforcement of this statute do not apply it to such mines but only to coal mines, where its provisions can be complied with, without injury to the industry.² In an action under this section the only inquiry for the court is as to a violation of the statute and the cause of the injury. If the statute is violated and its violation is the approximate cause of the injury, the master is liable, but assumed risk and contributory negligence are proper defenses, the same as they are to a breach of a common law duty;³ but a mere knowledge of a non-compliance with the provisions of the statute will not defeat a recovery, by an injured miner, and a "cager" at the bottom of the shaft is held to be within the protection of the statute,⁴ although the statute does not apply to a "hoisterman" at the top of the shaft, in lowering or hoisting the cage for others, as it was intended to apply to those who would use the cage to be hoisted or lowered into the mine.⁵

¹ R. S. Mo. 1889, Sec. 7066; R. S. 1899, Sec. 881; Amended, Sess. Laws, Missouri, 1901, p. 211.

² For discussion of the legal reasons why this statute should be confined, in its application to coal mines, see *White Mines and Mining Remedies*, Sec. 389, p. 516.

³ *Spiva v. Osage Coal & Mining Co.*, 88 Mo. 68.

⁴ *Durant v. Lexington Coal Mining Co.*, 97 Mo. 62.

⁵ *Barron v. Missouri Lead & Zinc Co.*, 173 Mo. 228. For a similar construction of Iowa Code, Sec. 2489, see *Jacobson v. Smith*, 89 N. W. Rep. 778.

§ 351. **Statutes requiring inspections.** — In order to prevent the defense of want of knowledge, under acts where an element of willfulness is necessary to be shown, to constitute a violation of the miners statutes, it is quite customary for the legislature to provide for the inspection of mines at regular intervals, and a failure to inspect in accordance with the statute has the same effect as a violation of any other similar provision, intended for the safety and protection of mine employees. A mere inspection is not, generally, a compliance with the statute, unless it is a proper inspection, for this is a duty which is devolved upon the owner, and, in several States, he is held incapable of delegating such duty to an employee.¹ This was the holding of a recent case, in Illinois, although, previously, in the same State, the Supreme Court held that as an element of willfulness was necessary to be shown under the act, if an inspection was made and a competent inspector employed, this ended the liability of the owner, unless it was shown that he was a party to the false or improper inspection.² Where willfulness is an element of the statutory negligence, it would seem to require a knowledge, to show an intentional disregard of the statute;³ a mine owner would not be liable for an improper inspection, in those jurisdictions where the inspector is held to be a fellow-servant with the injured employee,⁴ and generally, to

¹ A mere inspection is not a compliance with the Illinois Mining act, which requires a daily examination and that no miner shall be allowed to enter until all the conditions are proper, an injury from unsafe conditions, even after the inspection, will constitute a violation of the statute. *Pawnee Coal Co. v. Royce*, 134 Ill. 403; 56 N. E. Rep. 621.

² The Illinois examination statute, only makes the owner liable for a willful failure to have the mine inspected and if he has it inspected and an inspector makes a false report and a miner is killed as a result, there is no liability. *Himrod Coal Co. v. Schroath*, 91 Ill. App. 234.

³ *Leslie v. Rich Hill Coal Co.*, 110 Mo. 81.

⁴ *Delaware Canal Co. v. Carroll*, 49 Pa. St. 374; 10 Mor. Min. Rep. 47.

recover, for a neglect of such statutes it is necessary to show that the violation of the statute occasioned the injury¹.

§ 352. **Statutes providing means of ingress and egress.**—Most of the mining States have adopted protective legislation, regulating the construction of cages, derricks and hoisters, for hoisting and lowering employees into mines. The application of the statute to a given case, as well as what method adopted would be a compliance with the statute, depends largely upon the language of the act, and the statutes differ, in the different States. In some States a willful violation of the statute will, alone, constitute negligence, and, where this construction is adopted, an actual intent to violate the act, or, what is equivalent, a knowledge of the violation, must be shown.² In Pennsylvania, and under the English Metalliferous Mines Act, requiring a cage, with guides, a mere tub, or bucket, which is hoisted and lowered upon a rope, so that it may swing against the sides of the shaft, is not a compliance with the statute.³ In Illinois, it is held that the statute is

¹ An action will not lie for the violation of Illinois law requiring an inspection of the mine each morning, before the miners enter (Starr & C. St. Ch. 93, Sec. 4), where an inspection was made three hours before the accident, but after the employees had commenced work, since the defect, not then discovered, could not have been discovered earlier. *Missouri & I. Coal Co. v. Schwab*, 74 Ill. App. 567.

² A mere non-compliance with Illinois statute (§ Starr & C. Ch. 93, Secs. 6, 8, 14), requiring lights and gates to shaft, does not make out a willful disregard of the statute, but to constitute such a case, an intent to violate it must be shown. *Odin Coal Co. v. Denman*, 84 Ill. App. 190; 57 N. E. Rep. 192.

³ A bucket, three feet across, hung upon a rope, with no guides or covering, but hanging so that it will strike the walls and timbers in being hoisted or let down into a mine, is not a compliance with Pa. Act, June 2, 1891, requiring a cage, with guides and covering. *Com. ex rel. Elk Hill Coal Co.*, 4 Lack. L. News, 80. Under the English Metalliferous

violated, although a cage is provided, if it is not kept in a reasonably safe and secure condition, or, in other words, the common law is applied as a test as to what would be considered a compliance with the statute.¹ In Missouri, the "Cage Statute," providing for a sheet iron, covered cage, with guides, for "hoisting and lowering persons" into the mine, is not held to apply to an injury, on top of the ground, from a defective derrick;² but in Indiana, the "Cage Statute," with similar provisions, is held to be violated by an injury to an employee in the bottom of the mine, running cars, although not "ascending or descending,"³ and a similar construction is adopted in Illinois, as to an employee who had just stepped upon the cage.⁴

Mines Act, of 1872, requiring a cage, with guides, a mine owner is liable to prosecution for an injury where only a bucket is used, without guides as the act requires. *Foster v. Mining Co.*, 1 Q. B. 71.

¹ And even where the Cage Statute of Illinois is complied with, if the owner permits the valve of the engine to get so out of order that it will emit steam and start the engine automatically, he is liable for the death of a miner, caused thereby. *Con. Coal Co. v. Maehl*, 31 Ill. App. 252.

² *Barron v. Mo. Lead & Zinc Co.*, 72 S. W. Rep. 534.

³ Horner's Rev. St. Ind. (1897, Sec. 5480j) requires a cage covered with boiler iron, for the use of persons ascending and descending in the mine, and the Appellate Court of that State holds that a miner employed in running cars at the bottom of the shaft is within the protection of the statute, although not "ascending or descending." *Bodell v. Brazil Block Coal Co.*, 25 Ind. App. 654; 59 N. E. Rep. 856.

⁴ An employee was killed, in Illinois, as a result of a violation by the employer, of the act of 1873, Ch. 98, preventing the hoisting of coal while a miner was being hoisted or lowered in the mine, by a piece of coal falling upon him. The employer was held liable for this violation of the statute and there was held to be no variance between the evidence, which showed that the employee had just got upon the cage, and the petition, which charged that he was ascending, at the time he was struck by the coal. *Litchfield Coal Co. v. Taylor*, 81 Ill. 490; 10 Mor. Min. Rep. 684. For a discussion of the question of the application of the "Missouri Cage Statute" to lead and zinc mines, see *White Mines & Min. Rem.*, Sec. 389, p. 516 and note.

§ 353. **Assumption of risk from breach of statutory duty.** — The question has been recently mooted as to whether an employee of a mine employer, who has failed to comply with the statutory duties imposed upon him, will assume the risks of injuries, by remaining in the service knowing such duty is neglected. Mr. Dresser, in his recent work upon *Employer's Liability*, distinguishes between violations of the statute that existed at the time of the employment of the injured servant and those occurring afterwards and intimates that as to breaches of the statute existing at the time of the employment, the risks of resulting injuries are assumed, by the contract of employment.¹ Upon this question, however, the authorities are at variance and the author referred to seems in doubt as to the correct rule, in this regard.² But upon the other hand, the cases are numerous, from different States, that such risks are not assumed, for such a construction would abrogate the statute.³ It is true that the Missouri Appellate Court, rather intimated, in one decision, that if the dangers from a non compliance with the statutes were open and obvious, the risks would be assumed.⁴ But the court, in this case, evidently overlooked the decision of the Supreme Court of the same State, whose decisions are controlling upon the appellate courts of the State, that "such a declaration of law, would, in effect, nullify the statute."⁵ In Indiana, the owner's failure to com-

¹ Dresser Emp. Liab., pp. 249, 595-597.

² Dresser Emp. Liab., pp. 249-596.

³ Coal Co. v. Patting (Ill. 1904) 71 N. E. Rep. 871; Coal Co. v. Swagerty, 159 Ind. 664; 65 N. E. Rep. 1026; Green v. West Am. Co., 80 Wash. 87; 70 Pac. Rep. 310.

⁴ Adams v. Coal Co., 85 Mo. App., p. 493.

⁵ In this case, the Supreme Court said: "The next contention of appellant is that knowledge, on the part of the plaintiff, that the cage was not covered with iron, and that no contrivance had been provided for signaling from top to bottom of the shaft, should defeat the action.

ply with the statute requiring signals between the bottom and top of the mine (Burns R. S. 1901, Sec. 7470), is held to render him liable in damages in case of resulting injuries, and the doctrine of assumption of risk is held to have no application to a breach of statutory duty.¹ A similar rule is announced in Washington, as to a lack of timbers, where it is held the miner is not compelled to assume the risk of dangers from a breach of the duty imposed on the employer, by the statute.² And in Illinois it is even held that a failure to comply with the "miners statutes," abrogates the mine owner's defense of assumed risk and contributory negligence, as well, thus recognizing a right of recovery for a ground of negligence that did not, directly, cause the injury complained of.³ This rule is contrary to the general

Such a declaration of law would, in effect, nullify the statute." *Durant v. Coal Co.*, 97 Mo., p. 66. The above decision, however, is at variance with that of *Spiva v. Osage Coal & Mining Co.*, where it is held that if one voluntarily engages in work at a mine, where a statute providing for its safety has not been complied with, he assumes the risk and waives the provisions of the statute. *Spiva v. Osage Coal & Mining Co.*, 88 Mo. 68; *Adams v. K. & T. Coal Co.*, 85 Mo. App. 486.

¹ Assumption of risk no defense for injury from violation of statute in Indiana. *Boyd v. Brazil Block Coal Co.*, 50 N. E. Rep. 868, citing *Bartlett Coal M n. Co. v. Roach*, 68 Ill. 174; *Catlett v. Young*, 148 Ill. 74; 32 N. E. Rep. 447. But in *Bodell v. Brazil Block Coal Co.* (25 Ind. App. 654; 58 N. E. Rep. 856), it is held that the Indiana statute, relative to cages, covered with boiler iron (Horner's Rev. St. 1897, Sec. 5180m), does not affect the employer's common law defense of assumed risk, and for an injury from a failure to provide a cage, covered as the act provided, since the failure was obvious, a miner assumed the risk, notwithstanding the violation of the statute. *Island Coal Co. v. Swaggerty*, 159 Ind. 664; 65 N. E. Rep. 1026.

² *Green v. West. Am. Co.*, 30 Wash. 87; 70 Pac. Rep. 310.

³ Contributory negligence is not a defense to an injury caused by willful failure to comply with the mining law relative to furnishing props. *Sunnyside Coal Co. v. Perry Center* (Ill. App. 1902), 100 Ill. App. 546. A miner who is guilty of contributory negligence can recover under the act for the protection of miners, if the proximate cause of the injury is

established rule and the great weight of authority in the other mining States. But in Massachusetts, Minnesota, Alabama, and New York, the defense of assumption of risk still obtains as a defense to statutory negligence, the same as any other actionable breach of duty owed by an employer to his employee.¹ This is in accord with the nature

the willful failure of the mine manager to obey the provisions of the statute in reference to the furnishing of props. *Donk Bros. Coal & Coke Co. v. Stroff*, 100 Ill. App. 576. As to the defense of contributory negligence and assumption of risk, under the "Miner's statute" of Illinois, the court of that State has held that no such defenses can prevail, as the recognition of such a defense would virtually repeal the statute. "This court has held that contributory negligence is no defense to an action against a mine owner if an injury results to a miner by reason of a willful violation of the mines and miners' act. *Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 333; 61 N. E. Rep. 335. And we think the same reasoning applies to the doctrine of assumed risk. The statute expressly requires the mine owner to furnish a sufficient light at the top and bottom of the shaft to insure, as far as possible, the safety of persons getting on and off the cage. To excuse the mine owner from a compliance with said statute upon proof of the fact that the miner knew the mine owner was violating the statute would be to repeal the statute." *Spring Valley Coal Co. v. Patting* (Supreme Court of Illinois, 1904), 71 N. E. Rep. 371. In *Mt. Olive Coal Co. v. Herbeck* (92 Ill. App. 441; 60 N. E. Rep. 105), it is held that the Illinois statute, requiring props, is not subject to the defense of assumed risk. See, also, *Himrod Coal Co. v. Addick*, 94 Ill. App. 1.

¹ In Massachusetts it is held that there is no difference, as to the defense of contributory negligence, or assumed risk, whether the action is brought for common law, or statutory negligence, and this is, manifestly, the better doctrine. *Cassaday v. B. & O. Co.*, 41 N. E. Rep. 129. This is also the rule in Ohio, as to contributory negligence. *Kraus v. Morgen*, 40 N. E. Rep. 886. And also in Colorado. *Victor Coal Co. v. Muir*, 20 Colo. 320; 38 Pac. Rep. 378; 25 L. R. A. 435. It is held in Minnesota, that Gen. Laws Minn. 1865, Ch. 173, defining the duties of employers and directing the care to be used in the supervision of the ways, works and machinery, is but declaratory negligence and assumption of risk. *Lundberg v. Shevlin, etc., Co.*, 68 Minn. 135; 70 N. W. Rep. 1078. The Employers Liab. Act of Alabama, Code (Sec. 2590)—a substantial re-enactment of the Eng. Act, 1880—does not change the rule that an employee assumes risks of known defects. *Birmingham Co. v. Allen*, 18 So. R p. 8; 20 L. R. A. 457. A disregard of the statutory duty, under the N. Y.

of the implied contract of the common law, growing out of the contract of employment, and is the generally recognized rule.¹

§ 354. Contributory negligence a defense under statute. — The basis of the plaintiff's action, under the different mining statutes, is the neglect of the owner to comply with the statutory duty and, in this regard, the duty imposed by the law is the same as any other positive duty that has been neglected. It is incumbent upon the plaintiff

Laws of 1890, Chap. 398, p. 756, to guard or fence dangerous machinery, cog wheels, etc., does not render the employer liable, where the risk was obvious and was assumed in entering into the service. *Knisely v. Pratt*, 148 N. Y. 372; 42 N. E. Rep. 986; 32 L. R. A. 367. "The employers' liability acts of both New York and Massachusetts only apply where the employee "is himself in the exercise of due care and diligence at the time." *Sievers v. Eyre* (U. S. D. C., N. Y. 1903), 122 Fed. Rep. 784.

¹ Upon the question of assumption of such risks, Mr. Dresser says: "These are not statutes passed for the benefit of the public at large, but for the better protection of certain classes, the individuals of which may or may not, need the care. The statutes are not criminal, but are police regulations. The servant, consequently, has his private action, for a violation causing injury to him. It is difficult to see why, if the servant is given an action, he cannot barter it away, before the cause of action accrues, as well as fail to bring it, when he suffers injury. For many reasons the servant may prefer to forego the protection and as this does not affect the master's liability under the statute, or effect the welfare of the State, it should be permitted. If the principle, expressed in the cases, is carried to the extreme, an employer who had failed to fence his machinery, as required by statute, would be liable to the mechanic he had hired to remedy the defect, if the latter were injured through the absence of guards; or, a man who had agreed to keep his neighbor's roof clear of snow during the winter, but failing to do so, is injured by the snow falling upon him, could recover, if the owner of uncleared roofs was subjected to a fine. If the decisions quoted are to be followed, the odd state of affairs will exist, of a man who is mere'y careless, being barred, but one who deliberately undertakes a dangerous work, recovering." Dresser Emp. Lia., pp. 602, 603. The author then states the true rule to be that such risks are assumed by a servant, who, with full knowledge of the violation of a statute, remains at work. Dresser, Emp. Liab., pp. 603, 604.

in all cases of negligence, to show that the negligence of the defendant, whether statutory or otherwise, was the approximate cause of his injury, and, if, instead of a neglect of the statute, being the occasion of his injury, the wrongful act or neglect of the plaintiff, himself, occasioned the injury, then he could not recover.¹ In the very nature of the case, therefore, there is a difference between contributory negligence, as a defense under the statute, and that of assumed risk, and the former may obtain although the latter may not. This distinction is not recognized by the courts of the different States very generally, but is strongly accentuated and well reasoned by Mr. Dresser, in his recent well written work on Employer's Liability.² The Illinois Supreme Court failed to recognize the distinction, but held, in a recent case, that neither assumed risk or contributory negligence was a valid defense to an action for neglect of statutory duty,³ but the Missouri Supreme Court, in an able opinion by the late Judge Black, noted the distinction, between these two defenses, to a violation of the miners' statute of Missouri.⁴

¹ *Durant v. Coal Co.*, 97 Mo. 66; *Adams v. Coal Co.*, 85 Mo. App. 498; *Dresser Emp. Liab.*, pp. 603, 604; *Senior v. Ward*, 28 L. J. Q. B. 136; *Bodell v. Coal Co.*, 25 Ind. App. 654; *Cleveland &c. Co. v. Baker*, 61 Fed. Rep. 224; *Coal Co. v. Muir*, 20 Colo. 320.

² *Dresser Emp. Liab.*, pp. 602, 604. "Employers' Liability Act., Mass., § 1, subds. 2, 4, imposing a liability for the negligence of other employees, cannot be construed as relieving an employee from the caution and care of himself required by the common law." *Corning Steel Co. v. Pohlplotz*, 64 N. E. Rep. 476.

³ *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156; 63 N. E. Rep. 649; *Spring Valley Coal Co. v. Putting* (Ill. 1904), 71 N. E. Rep. 371; *Coal Co. v. Beaver*, 192 Ill. 333; 61 N. E. Rep. 335. And the Appellate Court also fails to note the distinction. *Sunnyside Coal Co. v. Perry Center*, 100 Ill. App. 546;; *Donk Bros. Coal Co. v. Stroff*, 100 Ill. App. 576; *Ill. Fuel Co. v. Parsons*, 38 Ill. App. 182.

⁴ See *Durant v. Coal Co.* (97 Mo. 66), where the court said: "But we do not say, in this case, that plaintiff could recover, if guilty of negligence himself." Contributory negligence is no defense to mine owner,

§ 355. **Pleading violations of statute.** — In pleading a cause of action for an injury from a violation of a statute for the safety or protection of miners, it is, generally, necessary for the plaintiff to bring himself within the class entitled to the benefits of the given statutory provision and to show a violation of the statute by the defendant and a resulting injury therefrom to the plaintiff.¹ It is held, under the Louisiana statute, making an employer liable for an injury to an employee from obeying a negligent order of a person, under whom he was placed in a subordinate position and subject to whose orders his employment depended, that a petition which failed to show that the person who gave the negligent order was empowered with command over the plaintiff, was demurrable.² And, likewise,

where he has failed to comply with Illinois statute (Hurd's R. S. Ch. 93; Sec. 8), for failing to construct escapement shafts. *Carterville Coal Co. v. Abbott*, 55 N. E. Rep. 131; *Ohio Coal Co. v. Denman*, 84 Ill. App. 190, 57 N. E. Rep. 192. "Where a miner was injured by reason of the mine owner's willful failure to maintain an open passageway around the landing place at the bottom of the shaft, as required by 4 Starr & C. Ann. St. 1902, pp. 845, 864, c. 93, §§ 2, 33, declaring that, for any injury occasioned by any willful violation of the act or willful failure to comply with its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby, the contributory negligence of such miner was no defense." *Chicago-Coulterville Coal Co. v. Fidelity & Causalty Co. of New York*, 130 Fed. Rep. 957. "Contributory negligence on the part of an employee of a mine is not a defense to an action for personal injuries brought by him, based on a willful violation, by the mine owner, of the duties imposed by statute." *Riverton Coal Co. v. Shepherd*, 111 Ill. App. 294. "Under the decision of the Supreme Court of the State contributory negligence is not a defense to an action against a mine owner to recover for the death of a miner under the coal mine law of Illinois (Laws 1896, p. 325, § 33), and such construction of the statute is binding on a Federal court." *Fulton v. Wilmington Star Min. Co.*, 133 Fed. Rep. 193.

¹ *Diamond Block Coal Co. v. Cuthbertson*, 67 N. E. Rep. 558; *Davis Coal Co. v. Pollard*, 62 N. E. Rep. 492.

² "Under Burns' Rev. St. 1901, § 7083, making a corporation liable for injuries to a servant resulting from the negligence of any person in the service of the corporation to whose order or direction the injured en-

where the provisions of the statute relied upon only applied to the defendant's mine, if ten or more men were employed, a petition which fails to show that ten men were employed by the defendant, at the time of the plaintiff's injury, is bad.¹ A substantial negation of the statutory provisions, however, is all that is necessary to be set forth, to show a violation of the statute relied upon,² and it is not, generally, necessary for the plaintiff to anticipate the

ployee at the time of the injury was bound to conform and did conform, a complaint alleging that plaintiff was injured by the negligence of defendant's foreman while plaintiff was performing the directions of such foreman — but which failed to aver that the foreman had any authority to give the order, or that plaintiff at the time was bound to conform thereto,, was insufficient." *Ft. Wayne Gas Co. v. Niemann* (Ind. App. 1904), 71 N. E. Rep. 59.

¹ Under Ind. Act, March 2, 1891, requiring certain safeguards in coal Mines, employing 10 men or more, a complaint which fails to show the employment of 10 men or more, is demurrable. *Dickason Coal Co. v. Unverferth*, 80 Ind. App. 546; 66 N. E. Rep. 759.

² "Under Ala. Code 1896, § 1749, subd. 1, providing that when an injury to an employee is caused by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer, the latter shall be liable as if the employee were a stranger, a complaint for injuries to a servant by reason of the fall of a derrick from certain alleged defects in the metal strips and rods by which it was held in position, and that the wall to which the derrick was fastened was not sufficiently strong to support the same, and that such defects arose from, or had not been discovered owing to defendant's servant, employed with the duty of seeing that the ways, works, and machinery were in proper condition, was not demurrable for indefiniteness of averment respecting the acts of negligence charged." *Southern Car & Foundry Co. v. Jennings*, 84 So. Rep. 1002. "Where it appeared from the complaint that plaintiff was an experienced miner, knew that defendant had failed to provide props, as required by Burns' Rev. St. Ind 1901, §§ 7466, 7472 (Horner's Rev. St. 1901, §§ 5480g, 5489m), and with this knowledge continued his work until injured, but that there was nothing in the appearance of the mine's roof to indicate immediate danger; that he was unable to find any defect therein by the usual tests; and that he could and would have propped the slate secure'y, if defendant had supplied props — the specific averments do not overcome a general allegation of freedom from fault." *Davis Coal Co. v. Pollard*, 62 N. E. Rep. 492.

defense of assumed risk or contributory negligence, by alleging a want of notice of the defendant's negligence, as this is a matter of defense, where it is competent to be relied upon as a defense.¹

§ 356. **As to the contributory negligence of infant.**—Although some of the cases hold that where contributory negligence can be predicated of an infant's acts, the same degree of care will characterize his conduct as that in the case of an adult person,² the better doctrine is deemed to be that as to an infant, his discretion and intelligence are factors to be considered in determining his ability to avoid the danger, notwithstanding his knowledge of the risk that he may incur by a given act. In Missouri, an instruction that a child was "bound to exercise such reasonable care and caution for his personal safety as a boy of his age, experience and intelligence was individually capable of" is error, as requiring the highest degree of care of which the child was capable, instead of that degree of care, which, under similar circumstances, would reasonably be expected

¹ An allegation under Indiana statute, that defendant failed to have a competent boss, inspect the mine every other day, or to prop the roof, sufficiently shows a violation of the statutory duties imposed by the act. *Diamond Block Coal Co. v. Cuthbertson*, 67 N. E. Rep. 558. "Burns' Rev. St. Ind. 1901, §§ 7447, 7472 (Horner's Rev. St. 1901, §§ 5472a, 5480m), provide that miners' bosses shall visit their miners at stated intervals in their working places, and see that they are made secure, and that a sufficient supply of props and timbers are always on hand; section 7466 (5480g) provides that the owners or operators of mines shall keep their miners supplied with props and timbers of proper lengths; and section 7478 (5480n) provides that they shall be liable for injuries occasioned by violation of this statute or any of its provisions. *Held*, that in an action by an employee for injuries occasioned by violation of the statute it was not necessary to allege or show in the complaint that plaintiff was ignorant of defendant's negligent failure to perform the duties imposed by the statute, or that he did not assume the risks resulting in the injury." *Davis Coal Co. v. Pollard*, 62 N. E. Rep. 492.

² *Graney v. St. L. I. M. & S. Co.*, 140 Mo. 89.

of one of his years and capacity.¹ Likewise it is error to instruct that if an infant had sufficient mental capacity to know whether or not he was liable to be injured by taking the position in which he sustained the injury complained of, then he was guilty of negligence in taking such position, as he may have lacked the discretion of an adult person to avoid the danger, although he really knew and understood it.²

¹ *Stern v. Benslecke*, 161 Mo. 146; 61 S. W. Rep. 594.

² *Thompson v. M. K. & T. Co.*, 93 Mo. App. 548; 67 S. W. Rep. 698.

CHAPTER XV.

INJURIES FROM POWDER EXPLOSIONS.

- SECTION 857.** Highest degree of care exacted from employer.
858. When skilled employee assumes the risk of.
859. Neglect of precautions — Careless storage of dynamite.
860. Substituting more dangerous explosives, without notice.
861. Employees injured by delayed shots.
862. The rule as to, in Missouri and Kentucky, distinguished.
863. Same — Ordering employee to return too soon.
864. Warning to inexperienced employee handling dynamite.
865. Failure to give warning of blast.
866. Same — What warning is sufficient.
867. Same — Where foreman fellow-servant, no liability.
868. Same — Injury to adjoining property owner.
869. Persons warned, deserting safe position.
870. When blasting violates law or ordinance.
871. Excessive amount of explosives in blast.
872. Blasting injuries by independent contractor.

§ 357. Highest degree of care exacted from employer. — “Persons using a powerful explosive in their business, such as powder, are charged with notice of any fact in reference to its actual effect that they could, by reasonable diligence, have ascertained. They must exercise the highest possible care and diligence to prevent injury to their employees and others, that human foresight is capable of. They must adopt all possible means to protect persons placed in danger from explosions and a failure to perform this duty is negligence, which renders them liable in damages.”¹ This is the language of a recent

¹ *Mather v. Rillston*, 156 U. S. 391; *Blackwell v. Lynchburg Co.*, 111 N. C. 151; *Chambers v. Chester*, 172 Mo. 461; 72 S. W. Rep. 904; *Smith v. Iron Co.*, 42 N. J. L. 467; 2 Mor. Min. Rep. 215; *Whittaker's Sm. Neg.*, pp. 281, 284; *Watson Dam. Per. Inj.* 3; *Cooley Torts*, 648, 718; *Western*

North Carolina case and reiterates the rule laid down in the text-books and numerous other cases on the same subject.¹ Of course the high degree of care, required from an employer, does not constitute him an insurer of his employees, as to injuries from powder explosions, but in such injuries, the plaintiff will be prevented by assumption of risk, contributory negligence and accident, from recovering, as in other actions for personal injuries,² and on account of the dangerous nature of the agency, the employee familiar with the force and effect of powder, as an explosive, is also chargeable with a greater degree of care and caution than in handling simpler and less dangerous appliances and materials,³ but injuries from explosions of powder require the highest degree of care and caution, upon the part of an employer and for an injury due to a failure to exercise such care, an action could be maintained.⁴

Coal & Mining Co. v. Berberich, 94 Fed. Rep. 329. In West Virginia, the measure of care imposed upon a mine owner in the use of dynamite, is held to be such ordinary care as a reasonably prudent man would use, under the same circumstances. *Schwartz v. Schull*, 45 W. Va. 405; 81 S. E. Rep. 914; 5 Am. Neg. Rep. 496.

¹ *Blackwell v. Lynchburg Co.*, *supra*.

² *King v. Morgen*, 10 Am. Neg. Rep. 200; *Wiskie v. Granite Co.*, 10 Am. Neg. Rep. 634, *Lanzi v. LeGrand Quarry Co.*, 11 Am. Neg. Rep. 209; *Bailey, Mas. & Serv.* 209; *Whittaker's Sm. Neg.* 399; *Livengood v. Mining Co. (Mo.)*, 77 S. W. Rep. 1077.

³ *Bailey Mas & Serv.*, *supra*; *King v. Morgen*, *supra*.

⁴ *Blackwell v. Lynchburg Co.*, *supra*. That dynamite is a dangerous explosive will be judicially recognized by the courts. *Norwalk Gas Co. v. Norwalk*, 68 Conn. 495. It will also be judicially recognized that coal oil is inflammable. *Stato v. Hays*, 78 Mo. 397; and that natural gas is inflammable and explosive. *Jamison v. Gas Co.*, 128 Ind. 555. Courts will judicially notice generation of gas, Sec. 879. Court will not take judicial notice that coal dust is an explosive. *Cherokee Co. v. Wilson*, 28 Pac. Rep. 178. It is not proper to permit proof of the "reputation" of a given powder, as to its high explosive character, but a witness personally acquainted with its safety, can give his opinion as an expert. *Souden v. Quartz Mining Co.*, 55 Cal. 443, 2 Mor. Min. Rep. 199.

§ 358. **When skilled employee assumes the risk.** — As before explained, on account of the dangerous nature of the agency, an employer of men to work with giant powder, or other high grade explosives, is compelled to use great care and caution, to prevent an injury to those liable to cause an unexpected explosion, either by ignorance or lack of experience with the nature of the material, and, in this regard, it is the duty to warn inexperienced employees and to adopt all known means to prevent injuries, either from negligence or otherwise.¹ But where the servant is of mature years and is ordinarily intelligent and experienced in the work, and the employer has no notice that he is not competent and familiar with the details of the work, he would be under no obligation to instruct him upon the dangers incident to his employment. After having accepted the employment with full knowledge of the dangers and nature of the tools and appliances used in connection with the work, he would be chargeable, as a matter of law, with the knowledge of the natural effect of different instruments upon the explosives and the danger of an explosion, from concussion and being chargeable with such knowledge, he would be held, in law, to have assumed the risks incident to the use of such tools and appliances, in connection with such explosives.² To hold otherwise,

¹ *Western Coal & Mining Co. v. Berberich*, 94 Fed. Rep. 329; 36 C. C. A. 364; *Mather v. Rillston*, 156 U. S. 391; 15 Sup. Ct. Rep. 464; *Finlayson v. Utica Mining Co.*, 14 C. C. A. 492; 67 Fed. Rep. 507, 513; *Blackwell v. Lynchburg Co.*, 11 N. C. 151; *Chambers v. Chester*, 172 Mo. 461; 72 S. W. Rep. 904; *Smith v. Iron Co.*, 42 N. J. L. 467; 2 Mor. Min. Rep. 215.

² *King v. Morgen* (C. C. A. 8 Cir.), 10 Am. Neg. Rep. 200, a leading case. See also, *Wiskie v. Granite Co.*, 10 Am. Neg. Rep. 684; *Dunn v. McNamee* (N. J.), 2 Am. Neg. Rep. 34; *Welch v. Grace* (Mass.), 1 Am. Neg. Rep. 614. Master not liable for explosion resulting from use of steel rod in drill hole. *Lanza v. Quarry Co.* (Iowa), 11 Am. Neg. Rep. 209. See also, *Whaley v. Coleman* (Mo. 1905), 88 S. W. Rep. 119. Nor for resulting explosion, where manner of loading hole was left to servant's discretion. *Hendelsay v. Williams* (N. H.), 28 Atl. Rep.

would be to make an actual insurer of the employer and render him liable for a lack of discretion or want of care, upon the part of an employee, and no man, with such a rule obtaining, would be safe in engaging in any such business as mining.

365. No liability where skillful employee explodes powder by striking it with pick. *Kelly v. Cable Co.*, 7 Mont. 70. An employee who attempts to drill out an unexploded charge of dynamite and is injured, cannot recover, if the duty was not within his service and he volunteered to do it. *Hamrick v. Quarry Co.*, 132 N. C. 282; 43 S. E. Rep. 820. An employee helping a "loader," in a quarry, to load a hole, cannot recover for result of explosion, as "loader" is not a vice-principal. *Kopf v. Steel Co. (Mich.)*, 95 N. W. Rep. 72. Where plaintiff and a competent boss, after a careful inspection conclude that an unexploded shot had fired and plaintiff proceeds to drill it out and is injured, the mine owner is not liable for their mistake in judgment. *Harris v. Quarry Co.*, 131 N. C. 553; 42 S. E. Rep. 773. Nor is a danger from drilling out missed holes, by an experienced employee, a risk that master is liable for, in case of injury. *Miller v. Stone Co.*, 61 Ill. App. 662. The neglect of a skilled employee to examine a drill hole, before drilling it out, for an unexploded shot, will prevent his recovery. *Sexton v. Turner (Va.)*, 15 S. E. Rep. 862; 16 Va. L. J. 584; *Livengood v. Mining Co.*, 179 Mo. 229, 77 S. W. Rep. 1077. A miner assumes the risk of injury from using an iron bar to tamp dynamite into a drill hole. *King v. Morgen*, 109 Fed. Rep. 446; *Kahn v. McNulta*, 147 U. S. 238; *Peterson v. Coke Co.*, 149 Ind. 260; 49 N. E. Rep. 8. An employee was not held to assume the risk, as matter of law, from dynamite that had been exposed to the weather for months, being exploded by a blow with a pick, of another workman, as it was extra-hazardous, by being so long exposed to the weather. *Myrberg v. Baltimore Min. & Red. Co. (Wash.)*, 65 Pac. Rep. 539. This would seem properly to have been the negligence of a fellow-servant, for which there was not legally a liability. In *Shanahan v. Emus* (51 W. Va. 137; 41 S. E. Rep. 140), where plaintiff was injured while swabbing out drill holes and there was no evidence that mine owner had neglected any duty imposed upon him by law, a verdict for plaintiff, for damages for an explosion, could not be allowed to stand. A skilled employee, drilling out a fuse, cannot predicate a recovery, upon the foreman's failure to tell him the fuse was wet, as this was immaterial. *Henderson v. Williams (N. H.)*, 23 Atl. Rep. 365. Where an explosion in a powder house occurs and there is no evidence as to what caused the explosion, an injured employee in there at the time, and killed, assumed the risk. *Craig v. Claflin & Rand Powder Co.*, 67 N. Y. S. 74.

§ 359. **Neglect of precautions — Careless storage of dynamite.** — In all occupations attendant with great and unusual danger, there must be used all appliances readily attainable, known to science, for the prevention of accidents, and the neglect to provide such readily attainable appliances is proof of negligence.¹ This rule applies to laborers, employed to handle high grade explosives, and for a failure to adopt such appliances as will prevent injury, or neglect to warn employees of accompanying danger resulting from the use of such agency, the employer will be liable, in case of resulting injury.² Accordingly, it is held, by the United States Supreme Court, that where the defendant carelessly stored dynamite and fulminating caps in an engine room, where they were in continuous danger of explosion from the great heat and the constant jarring and their confused condition, and the plaintiff was engaged to handle such explosives and the defendants permitted him to do so, without informing him of the danger from heat or concussion attendant upon the use of such materials, and an explosion occurred, as a result of such use and his ignorance of the true condition of the material, he was entitled to recover from the defendants.³ Nor would the defense of contributory negligence avail in such a case, if the plaintiff was ignorant of the danger, for in failing to warn the plaintiff, the defendant would be negligent, and without knowledge of the danger, contributory negligence could not be successfully set up against the plain-

¹ Whittaker's Sm. Neg. 126, 127, 130, 132, 133, 134; Hysell v. Swift, 87 Mo. App. 39; Williams v. East India Co., 3 East, 192; Carter v. Towne, 98 Mass. 567; Cooley on Torts, 705, 706.

² Smith v. Oxford Iron Co., 42 N. J. L. 467; 2 Mor Min. Rep. 208; Chambers v. Chester, 172 Mo. 461; 72 S. W. Rep. 904.

³ In this case the plaintiff was twenty-four years old and lost both his eyes. A verdict for \$10,000.00 was held not excessive. Mather v. Rillston, 156 U. S. 391; 15 Sup. Ct. Rep. 464; 18 Mor. Min. Rep. 165.

tiff.¹ Where either powder or nitro-glycerine is so negligently stored as to constitute a public nuisance, then anyone injured by an explosion is entitled to damages, without proof of any negligent act.²

§ 360. **Substituting more dangerous explosives, without notice.**—In line with the elementary doctrine of master and servant, that in case of an employment, by the master, of agencies or appliances, more dangerous than those formerly used, notice is required, to an employee, who is ignorant of the increased risks, it has been held in several cases that a mining company would be liable in damages for experimenting with new, untried or more dan-

¹ *Mather v. Rillston, supra.* "Placing in the air shaft of a mine, near a furnace fire which an employee is required to keep up, dynamite, which a jar or concussion of sixty pounds' weight will explode, and which the manufacturer packs in boxes marked, "Highly explosive," is gross negligence, in violation of the master's duty to furnish safe place in which to work." *Angel v. Jellico Coal Min. Co.*, 74 S. W. Rep. 714; 25 Ky. Law Rep. 108. "Under Gen. St. Conn. 1902, § 2618, providing that no person shall procure, transport, or use any compound more explosive than gunpowder without first obtaining a written permit therefor signed by the town clerk or selectmen where the same is to be used, specifying the name of the purchaser, the amount to be purchased, and the purpose for which it is used, the failure of a laborer handling dynamite for his employer, who purchased it, to obtain a permit, does not prevent him from recovering from the employer for personal injuries caused by the latter's negligence in allowing the use of frozen dynamite." *Currell v. Jackson*, 58 Atl. Rep. 762. "The storage of gun powder in quantities necessary for a business, which is located in a proper place and is conducted with the utmost care, is held in *Kleebauer v. Western Fuse & Co.*, not to be a nuisance *per se* so as to render owner liable for injuries caused by the explosion of the magazine, by an employee." 188 Cal. 497; 71 Pac. Rep. 617; 60 L. R. A. 377. In *Durand v. Asbestos Company* (Rap. Jud. Que. 19 C. S. 39), an employer was held liable for an injury for not providing a proper place to thaw out dynamite in use by his employees.

² *Wilson v. Powder Co.*, 40 W. Va. 413; *Judson v. Powder Co.*, 107 Cal. 549; *Schepper v. Chemical Co.*, 118 Mich. 582; *Lafin Powder Co. v. Tearney*, 131 Ill. 322, *Wood Nuisances*, Sec. 73.

gerous grades of giant powder, if accidents resulted to employees, not familiar with the risk resulting from its use.¹ In a New Jersey case, when the plaintiff employee first entered the service of the defendant, ordinary blasting powder was in use, with which he was familiar, but subsequently this was discarded for giant powder, a more dangerous explosive, without warning to the plaintiff, except through the printed directions of the defendant, and plaintiff being injured by a premature explosion, the defendant was held liable.² In a recent Missouri case, the plaintiff lost his eyes by a premature explosion of giant powder, with which he was charging a drill hole in the defendant's mine, and the negligence charged was the substitution, without notice to him, of powder of forty per cent nitroglycerine, instead of twenty-seven per cent, the grade he had been using and with which he was familiar. The court held that a miner was entitled to notice when a change is made in the powder furnished him, from a less explosive grade, to a more explosive one, and that for a failure to give such notice or warning, the defendant was liable in damages.³ Of course in these cases, the courts recognize the well established doctrine, that a miner, in entering upon the hazardous business of using giant powder, assumes all the risks that are ordinarily and necessarily incident to the business,⁴ but apply to the cases under consideration the well settled exception to the doctrine of assumed risks, that an

¹ Sowden v. Idaho Quartz Mining Co., 53 Cal. 443; 2 Mor. Min. Rep. 199; Spelman v. Fisher Co., 56 Barb. 151; 2 Mor. Min. Rep. 216; Wellington v. Oil Co., 104 Mass. 64; Elkins v. McKean, 72 Pa. St. 498; Whitt.'s Sm. Neg., pp. 130, 131, 232, 233, and cases cited. For furnishing "quick fuse," without warning, see Hedlum v. Holy Terror Co., 92 N. W. Rep. 81.

² Smith v. Oxford Iron Co., 42 N. J. L. 467; 2 Mor. Min. Rep. 208.

³ Chambers v. Chester, 172 Mo. 461; 72 S. W. Rep. 904.

⁴ Chambers v. Chester, *supra*; Smith v. Oxford Iron Co., *supra*.

employee does not assume risks resulting from the employer's negligence, of which he is ignorant.¹ Knowledge, on the part of the miner, of the risk and danger of the higher explosive used, would constitute an assumption of the risk, but in the absence of such knowledge, on his part, on account of the hazardous nature of the business, the exercise of proper care for the protection of those employed, would require notice of a higher grade explosive, and for a failure to exercise such care, a liability would result.²

§ 361. **Employees injured by unexploded shots.** — One of the most frequent sources of injuries from the use of giant powder, in mines, is due to the explosion of shots that have failed to fire, at the first attempt. The reports of personal injury cases present a very great variety of holdings in this class of explosion cases and different States have announced different rules governing the liability of employers for injuries resulting from such causes. As far as the adjudicated cases upon the subject can be classified, the test of liability in most is made to depend upon the notice on the part of the employer, of the unexploded shot and a failure to give proper and timely warning to the employee, or a reasonable opportunity for notice and warning by him and a like notice, or opportunity of notice, by the employee, or his fellow-servants and a failure to adopt proper precautions, on their part. If the master knows, or by

¹ *Curtis v. McNair*, 173 Mo. 270; 78 S. W. Rep. 157; *Nash v. Downing*, 93 Mo. App. 156; *Nicholds v. Glass Co.*, 126 Mo. 66; 27 S. W. Rep. 487.

² As said by the court in *Smith v. Oxford Iron Company* (42 N. J. L. 467), referring to the injured employee: "He did not agree to subject himself to the hazard attending the use of an unusually and highly explosive substance, of the dangerous quality of which, as well as the proper manner of applying it, he was wholly ignorant." 2 Mor. Min. Rep., p. 215.

reasonable diligence ought to have known of the unexploded shot, and fails to warn the employee thereof and the latter, in ignorance of the fact, drills into such shot and sustains injury therefrom, the employer is liable for such injuries.¹ On the other hand, if the employee is a skilled servant and familiar with the risks of that department of the service and has notice of the danger, or of facts that would charge him with such notice and fails to take such precautions as the extremely dangerous nature of the work would suggest, then he cannot recover for a resulting injury.² In those

¹ "To entitle a miner to recover for the negligence of the boss in ordering him to return, after two blasts had exploded, and fire a third blast, which the boss had attempted to ignite, it is not necessary that the boss willfully concealed the ignition of the third blast, but it is sufficient if it appeared that he had attempted to light it, and sent the miner back without waiting until it could be ascertained whether he had done so." *Bane v. Irwin* (Mo. 1908), 72 S. W. Rep. 522. "A servant employed in driving a tunnel in a mine does not assume the risk arising from unexploded blasts left by others without his knowledge, and of which he has not been warned, and which he cannot, by the exercise of reasonable care, discover." *McMillan v. North Star Min. Co.* (Wash. 1903), 78 Pac. Rep. 685. In *Grimaldi v. Lane* (Mass), 9 Am. Neg. Rep. 657, plaintiff employee called attention of the foreman to a hole that had missed fire. The foreman superintended the removal of the powder, done by another employee, with an iron spoon, or scraper, which the evidence showed was not a proper appliance for the purpose. An explosion occurred and on account of the negligent manner of unloading the hole and the plaintiff's inexperience, a recovery was allowed the plaintiff for his injuries. The law does not require an inspection of the unexploded holes by the master. *Livingood v. Zinc Co.* (Mo.), 77 S. W. Rep. 1077.

² Where an employee was holding a drill for another employee to drill out an unexploded shot, under the foreman's superintendence and it was suggested to pour water in the hole and plaintiff had no knowledge of the unexploded shot, but was experienced and knew the object of pouring the water in the hole and was not assured as to the safety of the operation, he was held, in Massachusetts, to have assumed the risk of the explosion. *Allerd v. Hildreth*, 5 Am. Neg. Rep. 610. See, also, *Welch v. Grace* (Mass.), 1 Am. Neg. Rep. 614. See, also, *Anderson v. Daly Mining Co.* (Utah), 4 Am. Neg. Rep. 86. "Where, in an action for injuries to a miner by a discharge of a blast, it appeared that a foreman had charge of the operating department of the mine for defendant, and was au-

States where the foreman is a vice-principal of the master, notice and failure to warn the servant, by such foreman, would be chargeable to the master;¹ but in all cases where the neglect to warn could be chargeable to a fellow-servant, in the discharge of a duty incident to the common work, a failure to warn the injured employee, on his part, would not render the master liable.²

thorized to hire and discharge men and direct them in the work, and that his supervision of the mine was supreme, except that defendant directed when new work was to be commenced, the plaintiff was entitled to rely on the information of such foreman with reference to the explosion of the blast, and was not guilty of negligence in working in the mine on the assumption that it had been exploded." *Allen v. Bell* (Mont. 1905), 79 Pac. Rep. 582.

¹ In Wisconsin, a case arose, where the plaintiff, with another employee, found an unexploded drill hole and after scraping out all possible powder, proceeded to drill it deeper, under the direction of the ground-boss; an explosion occurred and the master was held liable in setting the plaintiff about a dangerous work, where observation could not enlighten him of the danger, without warning. *McMahon v. Ida Mining Co.*, 1 Am. Neg. Rep. 741. To same effect, see *McMillan v. North Star Mining Co.*, (Wash. 1903), 15 Am. Neg. Rep. 203.

² In *Livegood v. Zinc Company* (Mo.), 77 S. W. Rep. 1077, the plaintiff was the helper of a steam drill man, with some experience as such. He was assisting him to drill out an unexploded shot, when an explosion occurred that injured him. It was held that he was a fellow-servant with the drill man; that the master was not negligent in failing to inspect the hole, before ordering them to drill out the shot and he was denied a recovery. In New York, the negligence of foreman to advise the plaintiff of an unexploded shot that he was directed to drill into, was held the negligence of a fellow servant, for which no recovery could be had. *Vitto v. Farley*, 2 Am. Neg. Rep. 47; *Cullen v. Norton*, 126 N. Y. 1. In Oregon, a similar holding was announced, where the employee was both assured of safety and ordered to drill out an unexploded shot, by the foreman, who had left fire in the hole, as a result of a "squib shot." *Mast v. Kern*, 5 Am. Neg. Rep. 88. "After two holes, from 6 to 12 feet deep, in a quarry, had been drilled and charged, and the battery had been applied, and an explosion had occurred, the boss and F. and E., two competent and experienced workmen, being in doubt as to whether there was an explosion in one of the holes, an examination was made by F. and E. under the supervision of the boss; and, in their judgment, it had exploded, and they so announced, whereupon, with plaintiff (another

§ 362. **The rule in Missouri and Kentucky distinguished.** — In Missouri, where a drillman had failed to inspect the mine for unexploded shots and as a result of such failure, his fellow-servant, a “helper,” was injured as a result of drilling into such unexploded shot, the Supreme Court held that there was no liability on the part of the mine employer for such injury, as the duty of looking for unexploded shots was held to be analogous to that of loading the drill holes with powder, in the performance of either of which duties, there was held to be no liability, upon the part of the employer, for a neglect on the part of either co-employee, occasioning the injury.¹ In Kentucky, however, the presence of an unexploded charge of dynamite, is held to be evidence of an unsafe place and since the law requires the employer to provide a reasonably safe place, the fact that the powder was left in the drill hole by a co-employee is held to be immaterial.² The rule established in Missouri seems more in accord with the weight of authority upon this question³ and more consistent

workman), they, at direction of the boss, commenced to clean it out in the usual manner, and without negligence, when an explosion occurred. *Held*, that the accident was not caused by neglect of duty, but by mistake, for which plaintiff could not recover.” *Harris v. Balfour Quarry Co.* (Md. 1902), 42 S. E. Rep. 978. The danger of missed shots is incidental to the work of drilling and an injury therefrom is assumed. *Browne v. King*, 100 Fed. Rep. 561. In Washington, it is held to be the duty of a company which had let a contract to drive a tunnel, to keep informed as to the location of missed shots, so as to inform employees, and in case of injury therefrom, to be liable therefor. *McMillan v. North Star Min. Co.*, 32 Wash. 579; 73 Pac. Rep. 685.

¹ *Livengood v. Joplin Mining and Smelting Co.*, 179 Mo. 229; 77 S. W. Rep. 1077.

² *Harp v. Cumberland T. & T. Co.*, 25 Ky. Law. Rep. 2133; 80 S. W. Rep. 510.

³ These cases seem to be in accord with the general rule which is announced wherever the question has been passed upon by the courts of the different States. In *Browne v. King* (100 Fed. Rep. 561), a steam drill man and his “helper” were held to be fellow-servants,

with established principles; for if the master's duty, as to place, is to be extended, by analogy, to such cases as this, then every act of a fellow-servant, by the same process of reasoning, can be held to be productive of a dangerous place and the common law doctrine of assumption of risk and especially of the risks resulting from the negligent acts of fellow-servants, is abrogated and the master is, in effect, an absolute insurer.

§ 363. **Same — Ordering employee to return too soon.** As the explosion of shots, where a large amount of explosives is used, is often delayed for a longer time than the customary period for such explosions to take place, it would be negligence, on the part of a mine

and each was held to assume the risk of injury from the negligent acts of the other, in their work of loading and unloading drill holes. An employee in a stone quarry, in Michigan, attempting to push dynamite into a drill hole, where a premature explosion occurred, was held to be guilty of such contributory negligence as precluded a recovery. *Kopf v. Stone Co.*, 95 N. W. Rep. 72. A similar rule was announced, in Massachusetts, as to an inexperienced quarry employee, holding a drill, for the superintendent to drill out tamping from an unexploded drill hole. *Allard v. Hildreth (Mass.)*, 5 Amer. Neg. Rep. 610. A like doctrine was laid down in Wisconsin, in the recent case of *Wiskie v. Montello Granite Co.*, 10 Amer. Neg. Rep. 684. In Iowa, an employee in a quarry, who used a steel bar to drill out a drill hole and struck an unexploded charge of dynamite, which occasioned an explosion and resulting injury, was held to have assumed the risk. *Lanza v. LeGrand Quarry Co.* (1902), 11 Amer. Neg. Rep. 209. See, also, *Whaley v. Coleman (Mo. 1905)*, 88 S. W. Rep. 119. An injury from an exploded blast, in a quarry where the manner of loading the drill hole was left to the employee's discretion, was held to give no cause of action in New Hampshire, in *Hendlesay v. Williams*, 28 Atl. Rep. 865. And in the following similar accidents, from explosions of dynamite in drill holes, the master was held not liable, viz., *Dunn v. McNamee (N. J.)*, 2 Amer. Neg. Rep. 34; *Welch v. Grace (Mass.)*, 1 Amer. Neg. Rep. 614; *Vitto v. Farley (N. Y.)*, 2 Amer. Neg. Rep. 47; *Cullen v. Norton*, 126 N. Y. 1; *Anderson v. Daly Mining Co. (Utah)*, 4 Amer. Neg. Rep. 86; *Mast v. Kern (Oregon)*, 5 Amer. Neg. Rep. 88.

owner, or his vice-principals, to order the workmen to return to the locality of an unexploded shot, without waiting a sufficient time to give the shots time to explode.¹ Conversely, if the employee, without notice to the owner or operator, should return, without waiting a sufficient length of time for all shots to explode, this would be such contributory negligence, on his part, as to preclude a recovery.² In one case, that came under the author's observation, it was held that an employer was negligent, who ordered his men to return upon a heavily loaded shot, after the expiration of only fifteen minutes, as this was not a sufficient length of time to give the shots time to explode.³ It would seem to be a more correct rule, in view of the fact that the evidence of what was a sufficient time, would necessarily depend upon the opinions of expert miners, to submit the question to the jury, and it has been held that it was for the jury to decide, under all the facts, if an employee was guilty of contributory negligence, in returning upon an unexploded shot too soon.⁴

§ 364. Warning to inexperienced employee handling dynamite. — The employer, in law, is presumed to know the danger to which his employees are subjected, in the performance of the duties of their service, and if his employees are inexperienced or uninformed of the dangers of

¹ In *Bane v. Irwin* (172 Mo. 306; 72 S. W. Rep., p. 522), the ground boss sent a miner back on an unexploded shot, which exploded and injured the miner, and it was held that owner was liable for negligence of boss, in not waiting to see if shot had been lighted. *Berg v. Boston Min. Co.*, 29 Pac. Rep. 545.

² *Davis v. Graham*, 29 Pac. Rep. 1007.

³ *Berg v. Boston Min. Co.*, 29 Pac. Rep. 545.

⁴ As to what is reasonable time to wait for explosion of blast, see *Eureka Co. v. Bass*, 8 So. Rep. 216. Whether employee is guilty of contributory negligence, in returning on blast too soon, is generally for the jury. *Davis v. Graham*, 29 Pac. Rep. 1007.

his service he is bound to warn them.¹ This duty, by the Supreme Court of the United States, has been held to apply to an inexperienced employee, engaged to handle such highly dangerous explosives as dynamite or giant powder,² and if laborers, engaged in such highly dangerous occupations are not informed of the accompanying dangers by their employers, and they remain in ignorance of the hazards of such service, and suffer in consequence, the employers are chargeable for the injuries so sustained.³ But a master is not bound to instruct an employee as to dangers within his employment if such information is fully within his knowledge,⁴ and where a miner had been employed for four or five years in drilling holes for blasting purposes in mines and had loaded fifty or more holes for the employer, up to the time of his injury, and was familiar with the manner of loading such holes and with the properties of dynamite, his employer was held, in Alabama, to be guilty of no negligence in putting him to work loading holes, without warning as to the dangers incident to the work.⁵

¹ *Bonnin v. Crowley*, 112 La. 1025; 36 So. Rep. 842; *Carter v. Dubach & Co.* (La. 1904), 36 So. Rep. 952; *Jancko v. West Coast & Co.*, 34 Wash. 556; 76 Pac. Rep. 78.

² *Mather v. Billston*, 156 U. S. 391; 15 Sup. Ct. Rep. 464; 18 Mor. Minn. Rep. 165.

³ *Mather v. Billston*, *supra*.

⁴ *Wendler v. Red Wing Gas & Co.* (Minn. 1904), 99 N. W. Rep. 625; *St. Jean v. Tolles Company*, 72 N. H. 587; 58 Atl. Rep. 506; *McManus v. Davitt*, 88 N. Y. S. 55; 94 App. Div. 481.

⁵ *Northern Alabama Coal, Iron, & Co. v. Beacham* (Ala. 1904), 37 So. Rep. 227. The following, from the *Scientific American*, for April, 1905, upon the dangerous properties of dynamite and the need of precautions, in handling, is not without merit: "Good dynamite is of a plastic consistency. It should not feel greasy to the touch. The density of it depends upon the 'dope,' which is the absorbing material. It embraces the physical properties of nitro-glycerine, which is its chief explosive principle and is equally poisonous. Its firing point is 180° C., and at this temperature it either burns or explodes. When free from pres-

§ 365. Same — Failure to give warning of blast. —
Where it is the custom to give employees a warning before

sure or vibration it burns; otherwise it explodes. The sensitiveness of dynamite to blows increases with the temperature; as Eissler says, 'at 850° F, the fall upon it of a dime will explode it.' When ignited in small quantities in the open air it burns with great vigor, but when larger amounts are ignited explosion invariably results. It freezes at 4° C., and when once frozen it remains in this state at temperatures exceeding it. When frozen it can be detonated only with difficulty and its force is weakened. It is true that all nitro-glycerine powders, when heated up gradually to the point of explosion, become extremely sensitive to the least shock or blow, and, once that point is reached, they no longer simply ignite but explode with great violence; and further, owing to the poor conductivity of the material, a small portion of dynamite in contact with the source of heat may reach this point and cause the explosion of the rest of the mass, which may be considerably below the danger point, as given by Walke. Let us look into the cause of explosions. Abel has shown that while the detonation of guncotton would cause the detonation of nitro-glycerine in close proximity to it, the detonation of nitro-glycerine would not cause the detonation of guncotton. His theory of synchronous vibrations, which he states: 'that the vibrations produced by a particular explosion, if synchronous with those which would result from the explosion of a neighboring substance, which is in a state of high chemical tension, will, by their tendency to develop those vibrations, either determine the explosion of that substance, or at any rate greatly aid the disturbing effect of mechanical force suddenly applied; while in the case of another explosion which produces vibrations of a different character, the mechanical force applied by its agency has to operate with little or no aid; greater force or more powerful detonation must therefore be applied in the latter case if the explosion of the same substance is to be accomplished. It is well known that dynamite, and for that matter all explosives containing nitro-glycerine, frequently explode through fall or friction. Experienced miners always drop the dynamite cartridge very gingerly into the bore hole, imbedding it in fine, loose sand that it may not be exploded by the manipulation of tamping. Not only is there great caution observed by users of black powder or dynamite in the coal mine before a blast is fired, but even greater danger presents itself when the explosive gases off large flames, setting fire to the coal dust and gases in the surrounding air. We to-day demand an explosive that is insensible to heat and cold, that permits of safe transportation and rough handling, that will not freeze, insensible also to shock, concussion or friction, and likewise flameless.'

a blast is set off, a failure to give such warning will constitute actionable negligence, if an injury results therefrom to an employee who relied upon such warning.¹ A recent New Jersey case illustrates the rule of liability resulting from a neglect of duty, in this regard, by the mine owner. The plaintiff was employed in a stone quarry and it was the custom for the foreman, who superintended the preparation of each blast, to give the employees warning before an explosion was to occur. The plaintiff was injured by a rock thrown by the blast, and the foreman had neglected to give the usual warning. The court held that a due and timely warning was embraced within the duty owed by the employer to his employees, and that the giving of such warning was not a mere incident of the foreman's work in preparing the blast, in his capacity as a fellow-servant of the injured employee, but was a duty delegated to him by the employer, for a breach of which the latter was liable.² Where a failure to give a proper

¹ *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253; 39 Atl. Rep. 764; 19 Mor. Min. Rep. 264. "Where a mining company let a contract for the driving of a tunnel in its mine, it was, in view of the hazardous nature of the mining occupation, and the well-known possibility of missing blasts, the duty of the company to keep itself advised in that particular as the work progressed, and keep watch of the location of charges and of the conditions following the explosions, and so be in position to inform a servant subsequently employed of the location of unexploded charges." *McMillan v. North Star Min. Co.* (Wash. 1903), 73 Pac. Rep. 685.

² As a reason for this rule, the court said: "When we consider the general duty owed by an employer to an employee, the propriety of including therein the duty of giving warning, in such circumstances as those now before us, becomes at once apparent. The danger of blasting was one frequently recurring and its occurrence could always be foreseen, not by the workmen scattered around the quarry, but by any person charged with the duty of watching for it. If the danger was not foreseen and proper warning given, the quarry became an unsafe place for the workmen, but it was made reasonably safe, if such warning was given. It seems clearly to follow, that on him whose duty it was to take care that the place should be kept safe, was cast the duty of giving timely warning. We conclude, therefore, that it was a part of the defendant's

warning of a blast is the only allegation of negligence, the action must fail, if the evidence all shows that such warning was, in fact, given, and, under such an allegation, evidence of negligence in using an excessive charge of powder, or other acts of negligence, would be incompetent, under the issues made by the pleadings.¹

duty to the plaintiff to see that proper care should be exercised in giving warning of an expected blast." *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253; 39 Atl. Rep. 764; 19 Mor. Min. Rep. 264. See, also, *Berg v. Boston Co.*, 17 Mor. Min. Rep. 470 and notes. No punitive damages recoverable, for such an injury from blasting. *McFadden v. Rausch*, 119 Pa. St. 507; 13 Atl. Rep. 459.

¹ *Mitchell v. Prange* (Mich.), 67 N. W. Rep. 1096. In *Pence v. California Min. Co.* (Utah, 1904), 75 Pac. Rep. 984, "plaintiff was twenty-two years old, wholly inexperienced as a miner, unfamiliar with drilling and blasting and the use of powder and fuse. The foreman knowing this, set him to blasting without any instructions as to the dangers. He used a fuse which was too short and had been cut off and capped, and he was injured in the resulting blast. A judgment for the plaintiff was affirmed. The court held that testimony showing a mining custom to have an inexperienced miner work with an experienced one was properly admitted." 16 Amer. Neg. Rep. 141. The failure of a shift boss to advise a miner of the number of unexploded blasts is not negligence, where he thought they all had wires protruding from the drill holes, which could be observed by the miner. *McMahon v. Ida Min. Co.*, 101 Wis. 102; 76 N. W. Rep. 1098. "The complaint in an action by a servant for injuries from an explosion of dynamite which alleges that defendants superintendent was negligent in failing to warn plaintiff of the existence of dynamite at the place where plaintiff was working, is sufficient without alleging that the superintendent had notice of the existence of dynamite at such place." *Robinson Min. Co. v. Tolbert* (Ala. 1901), 81 So. Rep. 519. "Where the explosion of a particular blast was in the control of plaintiff and a fellow-servant, and without warning the blast was exploded by the fellow-servant, injuring plaintiff, and a custom prevailed that no blast should be exploded without giving two distinct signals as to the supervision and control over such signals, the failure of such fellow-servant so to observe the rule was the failure of the master, as such servant stood in his place, and the master was liable for the resulting injuries." *Hjelm v. Western Granite Contracting Co.* (Minn. 1905), 102 N. W. Rep. 384. For injury and resulting liability of owner for negligence of foreman in failing to warn employee of missed charge of dynamite in mine, see, *Alton Lime Co. v. Calvey*, 47 Ill. App. 343.

§ 366. **Same — What warning is sufficient.** — It is not necessary that the mine owner should warn everybody far or near the place of the blast, before setting off a blast, but only those who, because of their proximity to the mine or quarry, are in danger of being hurt, by the explosion, if not so warned. In Michigan, it has been held not to be negligence for the owner to fail to warn persons living within a radius of five hundred feet of the blast, as it is not to be supposed that they would be hurt or injured by the explosion.¹ The giving of due and timely warning, ordinarily absolves the owner from any liability to one who received but did not heed the warning.² However, all should be notified who are within real or possible danger of the contemplated blast,³ and where it is a disputed question, under the evidence, if a warning was or was not given and if given, if it was sufficient, or, if not given, if it was necessary, it is a question for the jury to decide.⁴

§ 367. **Same — Where foreman fellow-servant.** — Since one of the ordinary risks of the business of mining, assumed by the employee in entering upon his duties, is

¹ *Mitchell v. Prang*, 110 Mich. 78.

² *Greatz v. McKeagle*, 9 Wash. 696; 38 Pac. Rep. 377. See, as to duty of railway contractor, to give notice, *Cameron v. Vandergriff*, 53 Ark. 381.

³ *Driscoll v. Newark & Co.*, 37 N. Y. 637.

⁴ *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163; *Harris v. Simon*, 32 S. C. 593; *Driscoll v. Newark Co.*, 37 N. Y. 637. See also *Orman v. Salvo*, 117 Fed. Rep. 238; 12 Amer. Neg. Rep. 393. "Where one employed in a stone quarry is told by the one who is in charge of the loading and shooting of blasts how to put dynamite in the holes, and is warned to be careful, the instructions are sufficient, and it is not necessary that the servant should be told not to attempt to force the dynamite into a hole too small to admit its entrance." *Kopf v. Monroe Stone Co.* (Mich. 1908), 95 N. W. Rep. 72; 16 Detroit Leg. N. 185. Whether employee waited a reasonable time for explosion of blast, is jury question. *Davis v. Graham*, 29 Pac. Rep. 1007; *Eureka Co. v. Bass* 8 So. Rep. 216.

the negligence of a fellow-servant, where the failure to give a warning of a blast, results from a foreman, or other employee, who is a fellow-servant of the injured employee, no recovery can be had for such resulting injury.¹ In California² and Pennsylvania³ the foreman of a crew of men in a mine or quarry is held to be a fellow-servant, and in these and other States, where such holdings obtain, the master would not be liable for injury resulting from a failure or neglect, on the part of such foreman, to give timely warning of a blast. The Federal Supreme Court⁴ also holds such foreman, or boss, to be a fellow and not a superior servant with an employee, working under him, and in the Federal courts, such negligence would also be insufficient to justify a recovery, unless the practice of the State where the injury occurred, would warrant a different holding. In New Jersey⁵ and Missouri⁶ foremen are held to be vice-principals, and in such States, a liability could be predicated, upon a failure to give warning of a contemplated blast, while in Ohio, the California and Pennsylvania doctrine obtains.⁷

¹ *McLean v. Mining Company*, 51 Cal. 256; *Stevens v. Doe*, 73 Cal. 27; *Lehigh Valley Co. v. Jones*, 10 Mor. Min. Rep. 30; *Delaware Co. v. Carroll*, 10 Mor. Min. Rep. 47. Employee, extracting blasting powder and foreman directing him to do so, are fellow-servants, in Maryland. *State v. Quarry Co.*, 55 Atl. Rep. 366.

² *Donovan v. Farris* (Cal.), 7 Am. Neg. Rep. 390.

³ *Delaware Co. v. Carroll*, 89 Pa. St. 374; 10 Mor. Min. Rep. 47. This rule also obtains in New York. *Perry v. Rogers* (N. Y.), 5 Am. Neg. Rep. 68.

⁴ *Alaska Gold Mining Co. v. Whelen*, 168 U. S. 82.

⁵ *Mooney v. Belleville Stone Co.* (N. J.), 4 Am. Neg. Rep. 195.

⁶ *Carter v. Baldwin* (Mo. App.), 81 S. W. Rep. 204. An employee, while off duty is not a fellow-servant with those engaged in setting off a blast and is entitled to notice, same as a stranger, if near enough to be hurt by blast and unaware of intended explosion. *Orman v. Salvo*, 117 Fed. Rep. 233; 12 Am. Neg. Rep. 393.

⁷ *Kelly Island Lime and Transport Co. v. Pachuta* (Ohio, 1904), 15 Am. Neg. Rep. 652. The court, in this case, refuses to follow *Mooney*

§ 368. **Same—Injury to adjoining property owner.** — The duty to warn those likely to be injured by a blast, extends to adjoining property owners, as well as to employees, and where the plaintiff, an employee of an adjoining owner of property near where a blast was exploded, was injured by stone and earth, thrown upon the adjoining property, by the blast, was not notified of the explosion, the defendant, setting off the blast, without notice, was held liable for the injuries. The court said: “The defendant was either bound to adopt such precautions as would prevent such missiles from reaching the place where the plaintiff then was, or to give him timely and personal notice of the setting off of such blast, to enable him to escape. The plaintiff was not bound to assume that the defendant was about to do a wrong and so be on watch to avoid it. He was of lawful right where he was, and had the right to assume, until personal notice or knowledge of the contrary, that others would not lawfully intrude upon him.”¹ But where the only injury, resulting to an adjoining owner, is alleged to be fright and sickness resulting therefrom, occasioned by large rocks and dirt being thrown by a blast, upon the roof of the plaintiff’s house, the plaintiff cannot recover, as the defendant is not liable for sick-

v. Belleville Stone Co. (N. J.), 89 Atl. Rep. 764; 89 L. R. A. 834. “Negligence of fellow-servants in placing dynamite near a furnace fire, which one was required to keep up, is imputable to the master, whose duty it is to furnish a safe place in which to work.” *Angel v. Jellico Coal Min. Co., 74 S. W. Rep. 714; 25 Ky. Law Rep. 108.* An employee of a “shift” off duty at the time of an explosion and asleep in his tent, is not a fellow-servant of the miners, so as to prevent recovery for injuries from a blast. *Orman v. Salvo, 117 Fed. Rep. 233.* The liability of a mine owner for the act of a ground boss, in sending a man back on an exploded shot, is not affected by the fact of the ground boss’ participation in the work. *Bane v. Irwin, 172 Mo. 306; 72 S. W. Rep. 522.*

¹ *St. Peter v. Dennison, 58 N. Y. 423; Watson Dam. Per. Inj., Sec. 182, p. 281.*

ness due to the purely internal operation of fright, resulting from the negligent act complained of.¹

§ 369. **Person warned, deserting safe position.** — “There is a line of cases, which hold that where one precipitates a danger suddenly upon another, the liability for damages is not avoided, even though the injured person may himself cause the injury,” by a misguided effort to escape, when if he had remained where he was the injury would not have occurred.² But there are few, if any cases, which permit a recovery, where a timely warning of the peril is given and the person warned, after having obtained a position of safety, leaves it to obtain another and in doing so, is injured.³ So, “where the defendant gives timely notice of an expected blast and after securing a position of safety, the terror caused by the explosion, prompted the party warned to leave the place he first selected and seek another and, in doing so, he was struck by a fragment of rock, thrown by the blast, and killed, his own act in so doing was the approximate cause of his death and the defendant would not be responsible in damages therefor.”⁴ Upon the trial of such a case it would not be error to permit witnesses who were present to say that they had not heard any warning given, before the explosion, although there was positive evidence that such warning was given, for the question of whether or not any warning was given and its sufficiency, if given, are material issues of fact, to be submitted to the jury.⁵ A person is not

¹ *Smith v. Cable Co. (Mass.)*, 7 Am. Neg. Rep. 54. But see, *contra*, *Cameron v. N. E. Tel. & Teleg. Co. (Mass.)*, 13 Am. Neg. Rep. 86; *Watkins v. Kaolin Mfg. Co.*, 13 Am. Neg. Rep. 197, a late North Carolina case, well considered.

² *Watson Dam. Per. Inj.*, Sec. 89, p. 105.

³ *Idem*, p. 106.

⁴ *Greatz v. McKenzie*, 9 Wash. 696.

⁵ *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163; 10 Amer. Neg. Rep. 102.

prevented from a recovery, because of an error in judgment, in seeking a safe place, however, but if he makes an effort to save himself from the injuries, the defendant would be liable, if no proper precautions had been taken to protect the plaintiff.¹

§ 370. **When blasting violates law or ordinance.** — Any act, resulting in injury to another, which is in violation of a law or ordinance, is sufficient breach of duty imposed by law, to constitute negligence justifying a recovery for the resulting injury, in the absence of a good defense.² Accordingly, where one is injured as a result of blasting, which is conducted in violation of some provision of a statute or an ordinance, the injured party has a cause of action against the party doing the blasting.³ Generally, it is sufficient to make a *prima facie* case, to allege that the acts were not done in accordance with the statute or an ordinance on the question and such an allegation of negligence, without more, will justify the submission of the case to the jury, upon the question of the defendant's negligence.⁴ In Missouri, a case arose where an ordinance of the town where a blast was set off, required that all places where blasting was conducted should be covered, before the explosion was set off, and an injury resulted, and it was shown that the blast was not inclosed or covered, as required by the ordinance, and that was held to constitute "actionable negligence, sufficient to justify a recovery."⁵

§ 371. **Excessive amount of explosives in blast.** — Some cases have been decided where the negligence alleged for

¹ *Blackwell v. Lynchburg Co.*, 111 N. C. 151.

² *Watson Dam. Per. Inj.*, page 315.

³ *Devlin v. Gallagher*, 6 Daly (N. Y.), 494.

⁴ *Koster v. Noman*, 8 Daly (N. Y.), 231; *Devlin v. Gallagher*, 6 Daly (N. Y.), 494.

⁵ *Brannock v. Ellmore*, 114 Mo. 55.

injuries from blasting, was the use of too great an amount of powder, by which the rock was thrown to such a distance as to cause injury, when a proper use of the requisite amount of powder would not have occasioned an injury, which was not anticipated, on account of the great distance removed from the blast. The law of physics, being recognized by the courts, the great distance to which rock were thrown by a blast, as indicative of the force behind the rock, might, under certain circumstances, be held to constitute a *prima facie* case of negligence. Where the rock was hurled some nine hundred and forty feet, horizontally, by a blast, and this was shown to have been three times the usual distance to which it was thrown, this, of itself, was held *prima facie* evidence of negligence,¹ in a Washington case. So, throwing stone five or six hundred feet, causing death to persons struck thereby, is such an unusual distance, as to constitute evidence of negligence in using too great an amount of explosives, in Virginia.² From the above and other cases which discuss the defendant's duty to cause as little injury by blasting as can be done, consistently with the rights of others, it may be stated, as a general rule, that if the injury would not have resulted, if less powder had been used in the blast, or if less injury had resulted from a proper amount of powder, carefully used, the omission to use such less amount will constitute negligence, justifying a recovery, in the absence of countervailing circumstances.³

372. Blasting injuries by independent contractor. — One who employs a contractor to remove rock from his premises, by blasting, is not responsible to one injured, as

¹ Klepsch v. Donald, 18 Wash. 150.

² Simmons v. McConnell, 86 Va. 494. See, also, Newell v. Woolfork (N. Y.), 91 Hun, 211.

³ Booth v. O. R. T. Co., 140 N. Y. 267.

a result of the negligence of such independent contractor, unless, (1) the owner personally interferes with the work and the injury results from his own acts; (2) unless he has engaged the contractor to perform an unlawful act, in doing the blasting; (3) unless the blasting is conducted in such a manner as to constitute a public nuisance, or (4) unless the statute or ordinances, where the blasting is being done, prescribe a particular manner of carrying it on and the work is done in violation of the act.¹ This is in a list of the exceptional cases, noted by a New York court, where an employer or owner is responsible for the acts of an independent contractor, in a blasting injury, and they are very generally approved by the authorities as about the only cases in which the employer or owner would be responsible for such injuries, from the acts of an independent contractor, employed by him.² Where the evidence is all to the effect that the party whose negligence caused the injury was an independent contractor, over whom the owner reserved no authority, then the court ought not to submit the case to a jury, in an action against the owner,³ but if the evidence, upon the question of whether the owner reserved any authority over the acts of the contractor, as to the method of doing the work, or he is brought within any of the exceptions to the rule governing his non-liability, in such case, is conflicting, then it is proper to submit the question of whether or not the contractor acted, as such, in an independent capacity, to the jury.⁴

¹ *Berg v. Parsons* (N. Y.), 4 Am. Neg. Rep. 432.

² Same as above; see *ante*, Sec. , p. ; *Fell v. Coal Co.*, 23 Mo. App. 234.

³ *Roemer v. Striker*, 142 N. Y. 134; *Mahoney v. Dankwarth* (Iowa), 6 Am. Neg. Rep. 278; *Benner v. Dredging Co.*, 134 N. Y. 156.

⁴ *Roemer v. Striker*, *supra*.

CHAPTER XVI.

INJURIES FROM GAS AND IMPURE AIR.

- SECTION 873.** Duty independent of statute.
874. Same — Test what reasonable man would do.
875. Statutes upon the subject.
876. Breach of statutory duty actionable negligence.
877. Statutes requiring "fire-boss."
878. Same — Neglect of "fire-boss."
879. Courts judicially notice generation of gas.
880. Violation of statute must occasion injury.
881. Constitutionality of ventilation statutes.
882. When willful violation of act necessary.
883. Examination of mines daily for — Missouri statute.
884. Assumption of risk by employee.
885. Same — Concurrent negligence of master and fellow-servant.
886. Contributory negligence bars recovery.

§ 373. **Duty independently of statute.** — Independently of statute, it has been held to be the duty of a mine employer to warn his employees of all dangers incident to the usual performance of their different duties and this would include the obligation to advise those, unacquainted with the fact, that the mine contained impure air or gas, and for a failure to discharge this duty, in case poisoning or other injury should result, the master would be responsible in damages.¹ It is even held in numerous cases, upon this and similar questions, that the master must not only use all ordinary means, known to him, to prevent injury to his employees, from such causes, but on account of the extreme danger of explosions from accumulated gases and

¹ White Mines & Mining Remedies, Sec. 462, p. 610 and cases cited; Strahlendorf v. Rosenthal, 10 Mor. Min. Rep. 676; 30 Wis. 674; Turner v. Tunnel Co., 1 Am. Neg. Rep. 270.

poisoning from impure air, around where employees are required to work, that the employer must use all means known to science to prevent such causes of injury to his employees, and for a failure to employ all possible means to prevent injury, that he can be made to respond in damages.¹ It is even the mine owner's duty to give a reasonable warning to third persons, likely to be injured by accumulated gas or impure air and, in Ohio, where the owner of an oil well permitted the explosion of the gas, in such a manner as to injure a bystander, he was liable in damages for the injury.²

§ 374. **Same — Test what reasonable man would do. —** Where there is a statute regulating the method or manner of ventilating mines, the statute itself would furnish a test of what was required of the mine owner, but independently of such a statute, the general rule of negligence would apply and the mine owner would only be negligent if he failed to use such precaution, as a reasonably prudent man, under the same circumstances, would do.³ The owner would not be liable for a failure to keep his mine absolutely free from gas, or impure air, but the duty imposed upon him by the law would be to introduce pure air, as fast as the gas formed, so that, by dilution, it would be expelled, or rendered harmless, and not to permit it to accumulate around where the employees are required to work, as standing gas.⁴ But proper means of circulating

¹ *Belleville Stone Co. v. Mooncy*, 61 N. J. L. 263; 39 Atl. Rep. 764; *Muddy Valley Co. v. Phillips*, 39 Ill. App. 376; *Musgrove v. Coal Co.*, 110 Iowa, 169. But as to duty to warn experienced employee, see *Consolidated Co. v. Sherer*, 42 Ill. App. 619; *Livengood v. Mining Co.* (Mo. Sup.), 77 S. W. Rep. 1077. See, also, *Mather v. Rillston*, 18 M. M. R. 65.

² *Ohio Co. v. Fishburn*, 61 Ohio St. 608; 56 N. E. Rep. 457.

³ *Godfrey v. Beattyville Co.*, 101 Ky. 339; *Mosgrove v. Coal Co.*, 110 Iowa, 169.

⁴ *Ante, idem.* *Commonwealth v. Tompkins* (Pa.), 1 L. L. R. 341; 4

pure air should be provided and not only provided, but furnished for the use of the men, and mere proof that the mine owner had provided appliances for the furnishing of the air, without evidence that it was actually furnished, would not be a defense to a suit for an injury from impure air or gas, for this is not what a reasonably prudent man, under the same circumstances, would do.¹

§ 375. *Statutes upon the subject.*—In the United States, the Federal Government and many of the mining States, have enacted particular statutes upon the subject, providing for the proper ventilation of mines generating gases injurious to life. By Section 6, of an act of Congress, approved March 3, 1891, it was provided as follows: “That the owners or managers of every coal mine at a depth of one hundred feet or more, shall provide an adequate amount of ventilation, of not less than fifty cubic feet of pure air per second, or thirty-three hundred cubic feet per minute, for every fifty men at work in said mine and in like proportion for a greater number, which air shall, by proper appliances or machinery, be forced through such mine to the face of each and every working place, so as to dilute and render harmless and expel therefrom the noxious or poisonous gases, and all workings shall be kept clear of standing gas.”² In England, the statute requires a constant ventilation, during the period that colliery is worked.³ The West Virginia statute requires that the mine be kept free from standing gas;⁴ the Illinois

Leg. Gaz. 238; *Muddy Valley Co. v. Philipps*, 39 Ill. App. 376; *Hughes v. Imp. Co.*, 20 Wash. 294; *Cerillos Coal Co. v. Deserant*, 9 New Mexico, 49; 49 Pac. Rep. 806; overruled, 178 U. S. 409; 44 L. Ed. 1127.

¹ *Commonwealth v. Hutchinson (Pa.)*, 4 C. C. R. 18. *Authorities supra.*

² 26 Stat. at L. 1104, Chap. 564.

³ 18 and 19 Vict. Chap. 108, Sec. 4; also, 23 and 24 Vict. Chap. 151; 35 and 36 Vict., Chap. 73 and 7 and 8 Geo. IV., Chap. 30.

⁴ Code, W. Va. 1891, p. 999 and acts 1887, Chap. 250.

statute provides for inspection and keeping the mine free from gas;¹ the Iowa Code requires such ventilation as to "dilute, render harmless and expel all noxious and poisonous gases, in all working parts,"² and similar provisions exist in Pennsylvania, Kansas and Ohio, Missouri, Indiana, Washington and a majority of the States where coal mining is carried on to any great extent.³ The general object of all these statutes is the same, to keep the mine and working places free from poisonous gases and vapors; to require — in some States — a competent "boss" to inspect and regulate the business and otherwise to exert the proper precautions to safeguard the protection of human life. A reference is always made, by lawyers, to the statute itself, for its terms and provisions, so no quotations from statute law will be presented here, but a reference to the different statutes, in some of the States, will be found in the foot note.

§ 376. **Breach of statutory duty actionable negligence.** — As before explained, where there is no statutory provision upon the subject, it would be a fair test to apply to the defendant's acts to ascertain what a reasonable man, under the circumstances, would have done, and if the defendant's course was consistent with that of a reasonably prudent man, there could be no negligence predicated of such an act.⁴ Where there is a statute providing the manner or means of ventilation, however, no such test can have any relevancy, but the statute itself controls the means the defendant must adopt, or render himself liable in damages, in case injury result.⁵ In a recent case, in New

¹ Ill. Act, July 1, 1887, Ill. Sess. Laws, 1888, p. 114.

² Iowa Code, Sec. 2488.

³ Pa. Act, 1870; Kan. Laws, 1897, Ch. 159; Ohio Rev. St., Sec. 301; Mo. Rev. St. 1899, Sec. 8802; Wash. Laws, 1891, Chap. 81.

⁴ *Ante*, Sec. 374; *Turner v. Tunnel Co.*, 1 Am. Neg. Rep. 270.

⁵ *Deserant v. Coal R. R. Co.*, 178 U. S. 409; 44 L. Ed. 1127.

Mexico, although the Government statute, above quoted, applied to the mine of the defendant, requiring at least "fifty-five cubic feet of pure air per second" and the other statutory precautions, to render the mine harmless and to expel therefrom noxious or poisonous gases obtained, the trial court instructed the jury upon the relative liability of the defendant and made his liability depend upon the test of what a reasonable man would have done, under the circumstances, instead of the absolute command of the statute. The duty of the defendant, being made imperative, by the statute, the act, itself, furnished a test of his liability, and the Supreme Court held that a violation of the statute constituted negligence, without reference to any other relative duty, predicated upon any other standard.¹

§ 377. Statutes requiring "fire-boss." — In some of the mining States laws have been passed not only requiring proper ventilation and a sufficient supply of pure air to expel all noxious and poisonous vapors, but to insure proper inspections and a full compliance with the statute, it is quite generally provided in the leading coal mining

¹ Upon this question, the Supreme Court observed: "The act of Congress does not give to mine owners the privilege of reasoning upon the sufficiency of appliances for ventilation, or leave to their judgment, the amount of ventilation that is sufficient for the protection of the miners. It prescribes the amount of ventilation to be not less than 55 cubic feet per second; it prescribes the machinery to be adequate to force that amount of air, through the mine, to the face of every working place. Nor does it allow standing gas. It prescribes, on the contrary, that the mine shall be kept clear of standing gas. This is an imperative duty and the consequences of neglecting it cannot be excused, because some of the workmen may disregard instructions. Congress has prescribed that duty and it cannot be omitted and the lives of the miners be committed to the chance that the care or duty of someone else will counteract the neglect and disregard of the legislative mandate." *Deserant v. Cerillos Coal R. R. Co.*, 178 U. S. 409; 44 L. Ed. 1127. But the question of whether or not the statute was violated if the evidence was conflicting, would be for the jury. *Ante, idem.*

States that the mine owner or operator shall also provide a "fire-boss," or "examiner," whose duties are variously provided by the different statutes, to examine the working places, before the workmen enter the mine, to protect them against "fire-damp," and he is usually required to preserve a record of his examinations or inspections, to use, in case of litigation, or injury.¹ These statutes differ in the various States. The above is a substantial statement of the requirements of the Kansas law, of 1901.² The construction, or effect these various statutes are held to have, when interpreted, by the courts, is of more consequence, in a text-book, than the specific provisions of each act, as they can be perused by the lawyers of each State, so the effect given the similar provisions of different States, will be given here and the reader will be left to an inspection of each statute for the full requirements of each.

§ 378. Same — Neglect of "fire-boss." — The effect of a neglect of the statutory duty, required, in the different States having such statutes, on the part of the "fire-boss" provided for, is viewed according to the doctrine of the courts of the various States, with reference to the question of fellow-servants. In those States where a foreman, or "boss" is held to be a fellow-servant with the men with whom he works, the employer would not be responsible for a neglect of the statutory duty, upon the part of a competent "fire-boss" but his liability would end, with the employment of a competent man and the installation of the appliances and machinery required by the statute. On the other hand, in those States where the foreman or "boss" is held to be a vice-principal and not a fellow-servant, the mine owner would

¹ Gen. St. Kan. 1901, Secs. 4150, 4162; Pa. Act, Mar. 8d, 1870; Pa. Act. Apr. 28th, 1877; Wash. Laws, 1891, Chap. 81.

² Gen. St. 1901, Secs. 4150, 4162.

be liable for a neglect of the statutory duty on the part of his "fire-boss," although he had complied fully with all the terms of the statute himself, with reference to the employment of a competent man and the use of the machinery and appliances required by the statute. In Pennsylvania, Washington and Colorado, the "fire-boss" is held to be a fellow-servant with the miners and the owner is not responsible for any neglect on his part,¹ while in Tennessee, Indiana and Kansas, a contrary effect is given the statute and the "fire-boss" is held to be a vice-principal, for whose negligence the master is responsible.² This is but one of the many inconsistent holdings obtaining in the different States, making apparent the necessity for a general system of laws for the different States of the American Union.²

¹ "A mining company providing a competent boss, as required by Pa. act, March 8d, 1870, is not liable for the death of a miner, from an explosion, caused by the negligence of such boss in failing to ventilate, as he was a fellow-servant." *Delaware Canal Co. v. Carroll*, 89 Pa. St. 374; *Redstone Coke Co. v. Roby*, 115 Pa. St. 364; 8 Atl. Rep. 593; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Iron Co. v. Lamb*, 6 Colo. App. 255; 40 Pac. Rep. 251; *Hughes v. Improvement Co.*, 20 Wash. 294; 55 Pac. Rep. 119; 6 Am. Neg. Rep. 228n.

² *Iron Co. v. Pace*, 101 Tenn. 476; 48 S. W. Rep. 232; 7 Am. Neg. Rep. 109n; *Mining Co. v. Persons*, 11 Ind. App. 264; 39 N. E. Rep. 214; *Schmalsteig v. Leavenworth Coal Co. (Kan.)*, 13 Am. Neg. Rep. 71; *Sommers v. Coal Co. (Wash.)*, 89 Fed. Rep. 54; 32 C. C. A. 156. In *Schmalsteig v. Coal Co.*, *supra*, the Kansas Court adopts the reasoning of the Indiana Court, in the case cited above, as follows: "In other words, the effect of the contention is that the employment of a competent mine boss is the full measure of the duty of the owner or operator of the mine in such cases. * * * The gist of the action is not the failure to employ a competent mine boss, but grows out of the failure of the employer to discharge the duties resting on him in relation to providing a safe working place for appellee. This duty appellant could not, in our opinion, by virtue of the provisions of the statute, delegate to the mine boss, so as to escape liability on account of the failure to perform the acts therein required. The statute prescribes the care which the employer is required to exercise. The employment of a competent mine

§ 379. Courts judicially notice generation of gas. — It is a matter of common concern that certain kinds of mines contain gases, which are a menace to health and life and a great source of anxiety to the lawmakers, as well as to the parties directly concerned.¹ Courts take judicial knowledge of things that are of common knowledge among people of ordinary information, as well as recognized scientific facts and principles, without the necessity of any evidence, but of their own motion.² Under this power of the courts, to keep pace with ordinary affairs of human life and to know what science teaches to all men, it is held, in Missouri, that courts will judicially recognize, that coal mines generate gases.³ This is a matter of common knowledge as well as scientific demonstration and like the fact that volatile oil, subjected to heat, will produce gases, is recognized as a fact, upon this reasoning.⁴ But if the matter was not conceded by all men, or was in doubt among experts, or those familiar with the facts, the courts would not judicially recognize that any particular kind of mines would generate gas, hence, in Kansas, it has been denied that the courts of that State would recognize, judi-

boss is not the exercise of the care. The failure of the boss to perform the duties designated in the statute is, under the statute, the negligence of the master. * * * In other words, the statute was not intended to lessen the duties of the master, but was intended to increase his duty, to the extent of requiring him to employ a mining boss to give special attention to the conditions of the mine. It was not contemplated, however, when the mining boss was employed, that such employment should relieve or exempt the master from liability."

¹ *Brown v. Piper*, 91 U. S. 87; *Bliss Code Pl.* (2 ed.) 177, 199; 1 *Greenl. Evid.* (14 ed.) 479.

² *Ante, idem.*

³ *Poor v. Watson*, 92 Mo. App., p. 98. Courts will also recognize that coal oil is inflammable. *State v. Hays*, 78 Mo. 807. That dynamite is a dangerous explosive. *Norwalk Gas Co. v. Norwalk*, 63 Conn. 495. And that natural gas is inflammable and explosive. *Jamison v. Gas Co.*, 128 Ind. 555.

⁴ *Fuchs v. St. Louis*, 133 Mo. 168.

cially, that coal dust was an explosive, as it was not generally conceded by those best informed upon the subject,¹ but that natural gas is an explosive will also be judicially recognized by the courts,² as this is generally conceded by those best informed upon the subject.

§ 380. Violation of statute must occasion injury. — Where the duties required by the statute are violated and this violation of duty, on the part of the mine owner, occasions the injury to the employee, then the owner will be liable for the resulting injury, whether it arises from a failure to inspect, a failure to employ a competent "fire boss," or to provide the statutory appliances, requisite to ventilate the mine, in the manner provided for.³ But to hold the mine owner liable for damages, the injury must have been occasioned by the failure, on his part, to comply with the requirements of the statute,⁴ for unless this occasioned the injury, then it would not be the approximate cause thereof, within the rule that actionable negligence, must be the approximate cause of the injury, to furnish any relief therefor. In Illinois, where the negligence charged was a failure to inspect the mine, to keep it free from fire-damp, and the evidence showed that the men had worked at the place where the injury occurred some two or three hours, with open lamps, before the accident hap-

¹ *Coal Co. v. Wilson*, 47 Kansas, 460; 28 Pac.Rep. 178.

² *Jamison v. Gas Co.*, 128 Ind. 255.

³ *Graham v. Newburg Coal & Coke Co.*, 38 W. Va. 273; 18 S. E. Rep. 584; *Muddy Valley Mining Co. v. Phillips*, 39 Ill. App. 376; *Knowles v. Dickinson*, 2 El. & El. 705; 29 L. J. M. C. N. S. 135; *Brough v. Homfray*, L. R. 8 Q. B. 771; 15 Mor. Min. Rep. 6. And a neglect to comply with statute will render company liable, although no penalty is provided for its violation. *Mosgrove v. Zimbleman Coal Co. (Iowa)*, 81 N. W. Rep. 227.

⁴ *Coal Run Co. v. Jones*, 127 Ill. 379; 20 N. E. Rep. 99. And this is generally true, under any statutory negligence. *Adams v. Coal Co.*, 85 Mo. App. 486.

pened, this was held to show, conclusively, that the failure to examine the mine at that place, with a safety lamp, as required by the statute, in no manner contributed to the injury.¹

§ 381. **Ventilation statutes constitutional as police regulations.**—In nearly every case where the liability for personal injuries is predicated upon a statutory neglect of duty, the constitutionality of such statutes is drawn in question by the defense, and for this reason, in mine injuries from poisonous gases and lack of ventilation, the validity of such statutes becomes very important to consider. The same year that the Pennsylvania act of 1871, was passed, requiring at least two openings not more than 150 feet apart, at every place where coal mining is carried on, there was an accident at “West Pittson,” where twenty lives were lost, and the constitutionality of this act was drawn in question, in the litigation that resulted. The court held that the State had the same right to police the coal mines, within her borders, that she had to police her towns and cities; that the statute was simply a mandate to operators of coal mines to so work and use their property as not to injure the health or endanger the lives of the persons employed in the mines, and of the necessity of the statute and its reference to the calamity to which the court applied it, it was aptly said: “Of its propriety and necessity the law-making power was taught not a moment too early. Of its constitutionality we have not the slightest doubt.”² Other States have construed and passed upon the validity of similar statutes and it is very generally held

¹ *Coal Run Co. v. Jones*, 127 Ill. 879; 20 N. E. Rep. 89; 8 N. E. Rep. 865.

² *Commonwealth, ex rel. Inspector of Mines v. Bonnell et al.*, 8 Phila. 584; 17 Mor. Min. Rep. 14; *Commonwealth v. Wilkesbarre Coal Co.*, 29 Leg. Int. 218; 15 Mor. Min. Rep. 81.

that the legislature of a State, under its police power, can establish a reasonable regulation for the working of mines, to protect the workmen employed therein.¹

§ 382. When “willful” violation of act necessary.— In the statutes of some of the mining States, a “willful” violation of the terms of the act is essential to constitute a cause of action for breach of its provisions. “Willful,” in such statutes, is used in the sense of “intentional,” and to predicate a cause of action upon the violation of such a statute it is therefore essential to show, both by pleading and proof, that the mine owner “intentionally” violated the provisions of the statute, which could only be true, if he failed to comply with the provisions, after knowledge of the fact that he had not complied with the statute. Under such statutes, the defendant must be shown to have had notice of the fact that the machinery, or appliances, were not there, and, with such notice, a neglect, or refusal, to supply same. The element of “willfulness” consists in the failure or refusal to do what the law requires, after notice that the necessity existed and hence, in maintaining an action under such statutes, the element of willfulness should be kept prominently in view, both in the pleading and throughout the trial, and a failure to show the statutory essentials to such an action, in this regard, would justify a demurrer to the evidence, on the part of the defendant.² But if the evidence shows the element of “willfulness,” under such a statute, or that, after knowledge of the non-compliance with the act, the defendant failed to comply with its requirements, then he would be liable for an injury to an employee caused thereby,

¹ *Daniels v. Hilgard*, 77 Ill. 640; 15 Mor. Min. Rep. 280; *Hamman v. Central Coal & Coke Co.*, 156 Mo. 282.

² *Hawley v. Dalley*, 18 Bradw. 391; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Leslie v. Rich Hill Coal Mining Co.*, 110 Mo. 81.

and this was held, in an Illinois case, to be a "willful neglect," to prevent accumulation of gases, as required by act of July 1, 1887.¹

§ 383. Examination of mines daily—Missouri statute.— The Missouri statute,² like many similar provisions in the different States, requires "the examination of all mines generating gas" every morning, by "a practical and duly authorized agent of the proprietor," and the condition of the mine is required to be recorded in a book, kept for the purpose; no miner is permitted to enter the mine before such inspection is made and a division of the currents of air is provided for, so that every fifty miners or less number shall receive a separate current daily. Coal mines are held, by judicial construction, to be included within the meaning of this statute, although not specifically named, as the court judicially notices that coal mines generate gas and the word "gas," as used in the statute is not limited in its meaning to "fire damp" only, but includes all injurious gases, generated in a mine.³

§ 384. Assumption of risk by employee.— An employee in a mine, has a right to assume, in the absence of knowledge to the contrary, that his employer has complied with the provisions of a statute requiring sufficient ventilation to render harmless all noxious gases, or expel them

¹ *Muddy Valley Mining & Mfg. Co. v. Phillipps*, 39 Ill. App. 376.

² Mo. Sess. Laws, 1895, p. 228; R. S. Mo. 1899, Sec. 8802, 8808.

³ *Poor v. Watson*, 92 Mo. App. 89. The petition in this case is approved and held to allege a cause of action under the statute, not at common law. "Where it was the duty of the pit boss of a mine to inspect it for gas, and to indicate by marks on the entry the absence or presence of gas, a miner had a right to rely on a mark made on the entry indicating the absence of gas." *Mt. Nebo Anthracite Coal Co. v. Williamson* (Ark. 1905), 84 S. W. Rep. 779.

from the mine.¹ The employee, therefore, would not, generally, be held to assume the risk of an injury from accumulated gas or vapors, without a knowledge, on his part, of the employer's failure to comply with the statute, a like notice of the dangers and risks of his employment, from such gases, and a voluntary assumption of the dangers attendant upon such work.² Where, however, the necessity for the statutory appliances was apparent and the employee remains at work, without complaint, or promise, knowing full well the dangers incidental thereto, a failure on his part to impart his knowledge of the dangerous condition of the ground to his employer and to advise him of the necessity for the statutory essentials, would probably be held to defeat the recovery of such employee.³

¹ *Mosgrove v. Zimbleman Coal Co.* (Iowa), 81 N. W. Rep. 227.

² *Ante, idem.* "In an action for injuries to a miner by explosion of gas, a requested instruction that if defendant kept the amount of air required in circulation in the mine, and plaintiff knew of the gas, but made no report thereof to the one whose duty it was to make an examination therefor, plaintiff was guilty of contributory negligence, was properly refused, as it made it the duty of the servant to inform defendant of the gas, whether defendant knew or ought to have known of that fact." *Mt. Nebo Anthracite Coal Co. v. Williamson* (Ark. 1905), 84 S. W. Rep. 779.

³ *Coal Co. v. Muir*, 20 Colo. 820; *Sugar Creek Co. v. Peterson*, 177 Ill. 824; *Coal Run Co. v. Jones*, 127 Ill. 379; 20 N. E. Rep. 89. In *Czarecki v. Seattle &c., Co.* (Wash.), 70 Pac. Rep. 750, where miner was killed from insufficient ventilation and the defense was assumed risk, the court said that the miner only assumed such risks as were open and apparent and which were necessarily incident to the employment. A miner who lights a match, without observing his safety lamp, assumes the risk of injury from a gas explosion. *Sommers v. Carbon Hill Coal Co.* 91 Fed. Rep. 337. And so does a miner who is warned of the danger of smoke and who knows the fan is shut down. *Hughes v. Oregon Imp. Co.*, 20 Wash. 294; 55 Pac. Rep. 119. An old, experienced miner, having charge of the ventilation of the mine, assumes the risk of injury by suffocation from burning frame buildings, on the surface of the ground. *Coal Cr. Min. Co. v. Davis*, 90 Minn. 711; 18 S. W. Rep. 387. The negligence of a person having charge of the ventilation of a mine, under statute, is not an assumed risk. *Sommers v. Carbon Hill Co.*, 89 Fed. Rep. 54.

§ 385. **Same — Concurrent negligence of master and fellow-servant.** — The doctrine is very generally recognized in the United States that the rule which exempts an employer from the result of injuries due wholly to the negligence of the injured employee's fellow-servants, will not exempt him from such injuries as result from the concurrent negligence of the defendant, himself, and such fellow-servant.¹ Injuries resulting from accumulated gases in mines is no exception to the application of this rule, in other personal injury cases, and it is held that where an injury results from insufficient ventilation, or accumulated gases, in a mine, the mine owner is liable to the injured miner, although the negligence of a fellow-servant of the injured miner concurred with the neglect of the mine owner to produce the injury.² But if the negligence of such fellow-servant could be imputed to the injured miner, himself, which would result from a relation wherein the negligence was adopted by such miner, or where the act was ordered by him, or could be really said to be his own act, then the doctrine of imputed negligence would apply to the act of such injured miner and he would be prevented, on account of the negligence of his fellow-servant, imputed to him, from recovery.³

¹ *Watson Dam. Per. Inj.*, p. 81, *et sub.*; *Whittaker's Sm. Neg.* 81 "Acts 1881, Tenn. § 7, requires the ventilation of all mines, and prescribes the quantity of pure air that must be furnished to dilute the noxious gases so as to render the mine safe, and provides the sizes and dimensions of the take in and return air way for ventilating purposes. *Held*, that where a mine owner failed to provide ventilation in conformity to such section, and an explosion occurred by reason of such negligence and the concurring negligence of a fellow-servant in going into a gaseous chamber, which had been marked, with an open lamp, by reason of which plaintiff's decedent was killed by an explosion which followed, the mine owner was liable therefor." *Russell v. Dayton Coal & Iron Co.*, 70 S. W. Rep. 1.

² *Czarecki v. Seattle & San Francisco Co.* (Wash.), 70 Pac. Rep 750.

³ *Beach Con. Neg.*, Sec. 100, 142; *Burrows v. March Gas & Coke Co.*, 5 Exch. 67; L. R. 7 Exch. 67; L. R. 7 Exch. 96.

§ 386. **Contributory negligence bars recovery.** — The failure of an employee to exercise ordinary care will preclude him from maintaining a cause of action given by the statute for damage occasioned by a failure to keep a mine free from accumulated gases or vapors,¹ for contributory negligence is always a defense to personal injury actions, whether the negligence counted on is the breach of statutory duty imposed, or otherwise.² Where the facts showing negligence of the injured employee are all one way, then the contributory negligence of the injured employee is a question of law for the court;³ but if the facts are controverted as to whether or not he was guilty of any negligence, or if, from all the evidence, the court could not say, as a matter of law, that the plaintiff was guilty of contributory negligence, then this issue should be submitted to the jury.⁴

¹ *Krause v. Morgen*, 53 Ohio St. 26; 40 N. E. Rep. 886; *Coal Run Co. v. Jones*, 127 Ill. 879; 20 N. E. Rep. 89.

² *Adams v. Coal Co.*, 85 Mo. App. 486.

³ *Krouse v. Morgen*, *supra*.

⁴ *Strahlendorf v. Rosenthal*, 10 Mor. Min. Rep. 676.

CHAPTER XVII.

FALLING SLABS AND BOWLERS.

- SECTION 387. Frequency and cause of accidents from.**
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§ 387. Frequency and cause of accidents from. — One of the most frequent causes of injuries in mines is that resulting from loosened earth or rock. This necessarily results from the very nature of the business, for the object of the work is to excavate and remove the earth and rock, to get the mineral, and unless great precaution is observed the loosened rock and earth, as the excavation progresses, will fall before it is expected. In what is known as "sheet formation" among miners — which is frequently met with in the coal and lead and zinc regions of the United States — constant inspections and timbering or trimming of the roof and sides of drifts is necessary, especially where the rock is divided by seams of softer matter, not impervious to the action of the air and water. In "boulder formation" the same liability of injury from falling "boulders" results, unless the sides and roof of drifts are kept well trimmed and arched, and even then, if the earth and rock are subject to the elements and softer

seams prevail, it will be found necessary to timber the ground, as the only safeguard against falling rock and earth, likely to injure the workmen below.

§ 388. **Statutes providing safeguards against.** — The great frequency of injuries, in mines, from falling slabs and bowlders, since the earliest times,¹ has given rise, in most mining countries and States, to different statutes, intended to provide precautions, with a view of lessening such accidents. As experience of those engaged in such work has demonstrated that the safest method of preventing injuries from falling slabs and bowlders is to timber and prop the roof of drifts, many of the States have adopted statutes requiring props and timbers to be furnished and used in the mine.² In others, where trimming of the roof is more practical, the lawmakers have adopted

¹ *Paterson v. Wallace*, 28 E. L. E. R. 48, came before the English House of Lords in 1854. The plaintiff's husband was killed by a falling stone from the roof of the drift where he was at work, of which he had often complained. The manager of the mine promised to remove it and sent two men to take it down, but before they did so, it fell and killed plaintiff's husband. It was held to be proper to submit the two questions to the jury, (1) if the defendant had negligently allowed the stone to remain too long and (2) if that negligence and not the decedent's rashness occasioned his death.

² 23 and 34 Vict. ch. 151; construed, *Brough v. Homfrey*, 6 L. R. 3 Q. B. 771; 15 Mor. Min. Rep. 6; Ill. Laws, 1883, p. 114, construed, *Pawnee Coal Co. v. Royce*, 184 Ill. 402; reversing 79 Ill. App. 469. For Illinois Prop statute, see Rev. St. Ch. 93, Sec. 16, construed in *Mt. Olive Coal Co. v. Herbeck*, 190 Ill. 89; 60 N. E. Rep. 105, affirming 92 Ill. App. 441; *Burns' R. S. Ind.* 1894, Sec 7479, requiring competent inspector, construed, *Eureka Coal Co. v. Wells*, 29 Ind. App. 1; 61 N. E. Rep. 236; *McLain's Code*, Iowa, Secs. 2463, 2465, construed, *Carson v. Coal Hill Co.*, 101 Iowa, 224; 70 N. W. Rep. 185; Ky. St. Sec. 2732, construed, *Ashland Coal Co. v. Wallace*, 101 Ky. 626; 43 S. W. Rep. 207; R. S. Mo. 8822, construed *Bowerman v. Lackawana Co.*, 98 Mo. App. 308; N. Y. Law, 1890, Ch. 394, construed, *Tetherton v. U. S. Co.*, 165 N. Y. 665; 59 N. E. Rep. 1181; R. S. Ohio, Sec. 6871, construed, *P & W. Coal Co. v. Estlevenard*, 53 Ohio St. 43; 40 N. E. Rep. 725.

acts requiring frequent inspections¹ and for the employment of a competent inspector;² but the general object of all these statutes is the same, to provide such precautions as will best serve the safety of the employees in the mine and, in case of an injury from falling rocks or bowlders, if the requirements of the statute are not followed, this is, usually, sufficient proof of negligence, upon which to base a recovery.³

§ 389. **Same—Neglect to timber roof.**—Independently of a statute requiring such a course, upon the part of a mine owner, it would be negligence for him to refuse to sufficiently prop or timber the roof of a drift or mine, so as to protect his workmen from falling slabs or bowlders.⁴ But most of the mining States have passed statutes, in order to insure this protection for the workmen, requiring the employer to properly timber or prop the mine, to prevent injury from falling rock or earth.⁵ A failure to com-

¹ Tenn. Act, 1881, Ch. 170, construed, *Coal Cr. Co. v. Davis*, 90 Tenn. 711; 18 S. W. Rep. 387; Pa. Act, March 8, 1870, construed, *Haddock v. Commonwealth*, 103 Pa. St. 248; Act. Cong. Mar. 8, 1891, construed, *Cerillos Coal Co. v. Deserant*, 9 N. M. 49; 49 Pac. Rep. 807; 178 U. S. 409.

² Laws Kansas, 1897, Ch. 159; *Schmalstieg v. Coal Co.*, 13 Am. Neg. Rep. 63; *Iron Co. v. Pace*, 101 Tenn. 476; 48 S. W. Rep. 232; 7 Am. Neg. Rep. 109; *Horner's R. S. Ind.* 1897, 5180m; *Wooley Coal Co. v. Bracken*, 80 Ind. App. 624; 66 N. E. Rep. 775.

³ *Bowerman v. Lackawana Co.*, 98 Mo. App. 808; *Himrod Coal Co. v. Stevens*, 208 Ill. 115; 67 N. E. Rep. 889; *Wooley Coal Co. v. Bracken*, 80 Ind. App. 624; 66 N. E. Rep. 775.

⁴ *White Mines & Min. Rem.*, Sec. 468, p. 612; *Barringer & Adams Mines*, p. 788 *et sub.*; *MacSwinney Mines*, p. 612; *Trihay v. Mining Co.*, 10 Pac. Rep. 615; 15 Mor. Min. Rep. 535; *Jones v. Min. Co.*, 21 N. W. Rep. 361; *Pantig r v. Min. Co.*, 100 N. Y. 868; *Jones v. Florence Min. Co.*, 28 N. W. Rep. 207.

⁵ *Labatt Mas & Serv.*, Sec. 802, p. 2195; *Hurd's R. S. Ill.*, Chap. 93; *Sess. Laws*, 1883, p. 114; *R. S. Mo.* 1899, Sec. 8822; *Burn's Rev. St. Ind.* 1894; *McLain's Code*, Iowa, Secs. 2468, 2465; *N. Y. Law* 1897, Ch. 415; *R. S. Ohio*, Sec. 6871; *Pa. Act* Mar. 8 1870; and revisions; *Tenn. Laws* 1881, Ch. 170; *Ballinger's Ann. Code* Wash, Sec. 8178.

ply with a statute requiring timbers, would constitute a *prima facie* case of negligence against the mine owner,¹ but the necessity for timbers, or the application of the statutory duty imposed, in a given case, would be a question of fact for the jury, where the question was disputed.² Where the condition of the ground is such that timbering ought to follow immediately after shots are set off, to keep the roof safe and prevent falling slabs or bowlders, a failure to timber it, within a reasonable time, would constitute negligence, in case of a resulting injury.³ But after a necessary amount of timbers is furnished, an employee whose duty it was to use such timbers could not recover for an injury, if he had failed to do his duty in this regard, as his contributory negligence would preclude a recovery,⁴ and where the necessity for timbers was apparent and the employee remained at work, with full knowledge of the necessity and dangers, without objection, no recovery could be had, for a resulting injury, as he would be held to have assumed the risk.⁵

§ 390. **Failure to inspect roof.** — It is the duty of the mine owner to inspect dangerous roofs, in the drifts of his mine, as often as may be necessary to keep

¹ *Bowerman v. Lackawana Coal Co.*, 98 Mo. App. 808; 71 S. W. Rep. 1072; *Green v. West. Am. Co.*, 30 Wash. 87; 70 Pac. Rep. 810.

² *Hammon v. Coal Co.*, 156 Mo. 232.

³ *Trihay v. Brooklyn Coal Co.*, 15 Mor. Min. Rep. 535; *Adams v. Coal Co.*, 85 Mo. App. 486.

⁴ *Christner v. Coal Co.*, 146 Pa. St. 67; *Coal Co. v. Muir*, 20 Colo. 320; *Sugar Cr. Co. v. Peterson*, 177 Ill. 354.

⁵ *Coal Co. v. Estlevenard*, 53 Ohio St. 43; *White Mines & Min. Rem.*, Sec. 465, p. 613. An employee injured by the falling of a lot of zinc spelter cannot recover, unless he shows negligence of the master, in its erection. *Lanyon Zinc Co. v. Bell* (Kan.), 68 Pac. Rep. 609. Where the evidence is conflicting as to whether or not timbers were furnished in time to be used, the question of whether or not the risk was assumed, is for the jury, in Missouri. *Hamman v. Coal Co.*, 156 Mo. 232; 56 S. W. Rep. 1091.

the same in a reasonably safe condition, to prevent falling rocks or earth.¹ A failure to inspect the roof and a resulting injury to an employee, from a falling slab or boulder, will render the master liable, the same as for any other act of negligence, for although ignorant of the danger from the loosened rock, if a careful inspection would have disclosed the danger and informed him of the risk, his failure to inspect will be such neglect as to subject him to a liability therefor.² Nor would the mere proof of an inspection relieve the employer, unless it is shown to have been a careful inspection, for a careless inspection would be no better than none at all and if the roof was carelessly inspected he would be liable, the same as though no inspection at all had been made.³ But an inspection would not be necessary if the whole condition of the roof was plainly in view, for an inspection is only necessary when dangers or defects are not open to common observation and if the employee has equal or superior means of knowledge to his employer, the latter would be under no obligation to inspect the roof. For the violation of statutory duty to inspect, a liability would result, the same as for neglecting any other positive duty, imposed

¹ One whose duty it is to inspect is not a fellow-servant with miner, *Gowen v. Bush*, 76 Fed. Rep. 849; 18 Mo. Min. Rep. 433. *White Mines & Min. Rem.*, Sec. 453, p. 605; *McCone v. Gallagher* (N. Y.), 2 Am. Neg. Rep. 613; *Benzing v. Steinway*, 101 N. Y. 550; *Hammon v. Co.*, 156 Mo. 282; *Carter v. Baldwin*, 81 S. W. Rep. 204.

² *Buswell Per. Inj.*, Sec. 211; *Bowman v. White*, 110 Cal. 23; *Coal Co. v. Schwab*, 74 Ill. App. 567; *Ashland Coal Co. v. Wallace*, 101 Ky. 626; *Smizel v. Iron Co.*, 116 Mich. 149; *Coal Co. v. People*, 181 Ill. 270; *White Mines & Min. Rem.* Sec. 453, p. 606 and cases cited.

³ *Durkin v. Sharp*, 88 N. Y. 225; *Egan v. Ry. Co.*, 42 N. Y. Supp. 188; *Car Co. v. Parker*, 100 Ind. 118; *Railroad Co. v. Ward*, 1 Am. Neg. Rep. 590.

⁴ *Coal Co. v. Greenwood*, 151 Ind. 476; *Garragen v. Iron Co.*, 158 Mass. 596; *Shea v. Ry. Co.*, 76 Mo. App. 29.

by law.¹ The foot-note contains a reference to many of the statutes requiring inspections.²

§ 391. **Failure to trim roof.** — Where the formation of a mine or drift is such as to make it impracticable to timber the same, to prevent falling slabs or bowlders, then the mine owner should make the same reasonably safe, by trimming the roof and sides of the mine or drift, so as to prevent injuries from falling slabs or bowlders, loosened by the shots in the mine.³ A failure to keep the roof reasonably safe by trimming it, when necessary, would subject the owner to liability, in case of a resulting injury, the same as negligence in any other particular.⁴ From the nature of the work, however, the liability in this regard is not without necessary qualification. The men known as “cutters” in the ground, are the first to usually come in contact with the working place and it is necessarily their duty to report any unsafe or defective condition to the master, or his foreman in charge; if the duty of the men in this regard should be neglected, as the employer is entitled to notice of the necessity for trimming, before he could be chargeable with a neglect of duty, he would not be responsible for a resulting injury.⁵ And where, with

¹ *Parnell Coal Co. v. Royce*, 184 Ill. 402; 56 N. E. Rep. 621, reversing 79 Ill. App. 469; *Jupiter Co. v. Mercer*, 84 Ill. App. 96; *Himrod Co. v. Schrooth*, 91 Ill. App. 284.

² R. S. Ill. 1894, R. 98, Sec. 9; Burn's R. S. Ind. 1894, Sec. 7479; McClain's Code Iowa, Sec. 2465; St. Ky., Sec. 2782; Laws N. Y. 1897, Ch. 415, Sec. 122; R. S. Ohio, Sec. 6771; Pa. Act Nov. 3, 1871; Tenn. Act 1881, Ch. 170; Ballinger's Ann. Code Wash., Sec. 8178. Whether or not an inspection of a roof was properly made, so to excuse the defendant, is for the jury to decide. *Fisher v. Lead Co.*, 156 Mo. 479; 56 S. W. Rep. 1107.

³ *Hammon v. Cent. Coal & Coke Co.*, 156 Mo. 282; *Fisher v. Lead Co.*, 156 Mo. 479.

⁴ *Smith v. Coal Co.*, 75 Mo. App. 177; *Hamilton v. Min. Co.*, 108 Mo. 864.

⁵ *Aldrich v. Furnace Co.*, 78 Mo. 559; *Watson v. Coal Co.*, 52 Mo. App. 366; *Boemer v. Lead Co.*, 69 Mo. App. 609.

full knowledge of the danger from falling rocks or earth, an employee continues work, without objection, and meets with a resulting injury, as a result of his own work, he is held to have assumed the risk, and cannot recover from his employer.¹

§ 392. **Duty to warn inexperienced servants concerning.**—It is the duty of the employer to warn his inexperienced servants, ignorant of the dangers, from falling slabs or bowlders, of any facts in his possession and not known to the employee, which materially affect the risks from such injury, while in his employ.² In an early case,

¹ *Swanson v. LaFayette*, 88 N. E. R.p. 1038; *Heald v. Wallace* (Tenn.), 71 S. W. Rep. 80. In Iowa, in the case of *Money v. Lower Vein Coal Co.* (55 Iowa, 671), it was held that a miner, who worked near a loose scale of coal without promise from the mine owner to change the condition and who was injured by such falling scale, assumed the risk and could not recover. See same case, 10 Mor. Min. Rep. 56. In *Hall, by next friend, v. Johnson* (84 L. J. E. 222), Earle, C. J., held to the same doctrine and announced the non-liability of the mine owner for a falling rock, about which the plaintiff was working, in the usual performance of his duties. In *Swanson v. LaFayette* (Ind. 88 N. E. Rep. 1038), an injury from a falling sand bank near which plaintiff was working, was held to be an assumed risk, which furnished no cause of action. In *Brown v. Chattanooga Co.* (47 Fed. Rep. 415), although illiterate, the plaintiff was held to have assumed the risk from a falling ditch, in which he was at work, as the character of the soil was apparent to any man. A similar holding was announced in the case of *Griffin v. Ohio and C. Company* (24 N. E. Rep. 888), where the defect in the bank of earth was a clay seam, between the gravel, open to observation. So, in *Meikle v. C. & A. Company* (79 N. W. Rep. 22), a quarryman injured by a falling rock, loosened by a previous blast he had helped to put in, was held to have assumed the risk.

² *McGowan v. LaPlata Co.*, 8 McCrary (U. S. C. C. Colo.), 898; 10 Mor. Min. Rep. 59; *Baxter v. Roberts*, 44 Cal. 187; 18 Am. Rep. 160. *Hammon v. Coal & Coke Co.*, 156 Mo. 232; *Hamilton v. Coal Co.*, 108 Mo. 864; *Larson v. Mining Co.*, 71 Mo. App. 512; *Patterson v. Cole* (Kan.), 78 Pac. Rep. 54; *Good Eye Mining Co. v. Robinson* (Kan.), 78 Pac. Rep. 102; *Carter v. Baldwin*, 81 S. W. Rep. 204; *Parkhurst v. Johnson*, 50 Mich. 70; 45 Am. Rep. 28; *Smith v. Oxford Iron Co.*, 2 Mor. Min. Rep. 208; 42 N. J. L. 467.

in Wisconsin, the plaintiff was employed to labor in the defendant's shaft and was injured from the caving in of the shaft.¹ The negligence charged was the knowledge, by the defendant, of a well defined fissure or crevice, of which he failed to inform the plaintiff. A recovery by the plaintiff was upheld and the court followed the rule laid down above, that if there exists any facts known to the employer and not known to the employee, increasing the risks of the miner beyond the ordinary hazards, the employer is bound to disclose such facts to his employee, or to respond in damages, as for negligence, in case of injury to the latter, resulting from such unusual risks. Where the dangers are clearly apparent, however, then it would be the duty of the employee to observe what was open to common observation,² and in such case, or if the injured employee was one skilled in the particular service, no warning or instruction, as to probable injuries from loosened slabs or bowlders, would be required, on the part of the master.³

§ 393. Employee not heeding warning.—An employee who is warned or instructed by a master, or his vice-principal, as to a dangerous manner or method of

¹ *Strahlendorf v. Rosenthal*, 80 Wis. 674; 10 Mor. Min. Rep. 676.

² *Watson v. Coal Co.*, 52 Mo. App. 366; *Aldrich v. Furnace Co.*, 78 Mo. 559; *Pederson v. Rushford*, 42 N. W. Rep. 1063; *Olsen v. McMullen*, 24 N. W. Rep. 318; *Reiter v. Winona Co.*, 75 N. W. Rep. 219; *Epperson v. Tel. Co.*, 155 Mo. 356; *Skidmore v. W. Va. Co.*, 23 S. E. Rep. 713.

³ *Aldrich v. Furnace Co.*, 78 Mo. 559 and cases above cited. Duty to instruct employee as to known dangers in roof, cannot be delegated. *Smith v. Hillside Co.*, 186 Pa. 28; 40 Atl. Rep. 287; *Con. Coal Co. v. Wombacher*, 134 Ill. 57; 24 N. E. Rep. 627; *Hedlum v. Holly Terror Co. (S. D.)*, 92 N. W. Rep. 81; *Wallace v. Standard Co.*, 66 Fed. Rep. 260. A mine owner cannot relieve himself from liability for negligence from loosened slabs by posting rules that his employees assume the risk from injuries from such sources. *Con. Coal Co. v. Lundak*, 196 Ill. 594; 63 N. E. Rep. 1079; *Himrod Coal Co. v. Clark*, 197 Ill. 514; 64 N. E. Rep. 282.

work, who proceeds in violation of the warning, cannot recover, in case of injury thereby, for this would be a selection of a dangerous way to do his work after warning and he would be held to assume the risk.¹ In Alabama, in a recent case, the plaintiff was engaged in driving a heading in the defendant's mine and was charged with the duty of pulling down, or bracing up, the loose rocks in the ceiling of the drift. About an hour before his injury, the foreman charged him to trim the roof, or secure the loose rock, but he ignored the warning or instruction, and was injured, and he was held to have assumed the risk.²

§ 394. **Contributory negligence of employee.** — Where an employee, whose duty it is to trim or timber the roof of a mine or drift, is injured as a result of failing to perform such duty, by a falling slab or boulder, his contributory negligence, in failing to do his duty in this regard, would prevent a recovery by him, for such resulting injury.³ Where the work of an employee continuously changes the place where he is at work, he is under the duty, in providing for his own protection, to see that he does not undermine the place and precipitate the mass of earth or rock, which he is engaged in excavating, down upon himself. If he undermines a bank of earth or rock and as a result thereof sustains injury, his own negligence, in so doing, will prevent his recovery.⁴ And where the employer has furnished props or timbers and requested his employees to use them to support the roof, in case of a

¹ *Pioneer Mining Co. v. Thomas*, 133 Ala. 279; 32 So. Rep. 15.

² *Pioneer Mining Co. v. Thomas*, 133 Ala. 279; 32 So. Rep. 15.

³ *Beomer v. Lead Co.*, 69 Mo. App. 601; *Watson v. Coal Co.*, 52 Mo. App. 366; *Aldrich v. Furnace Co.*, 78 Mo. 559.

⁴ *White Mines & Min. Rem.*, Sec. 450, p. 595; *Heald v. Wallace* (Tenn.), 71 S. W. Rep. 80.

failure to use such props, by the men so requested, and a resulting injury to one failing in his duty, in this regard, no recovery could be had.¹ But where the evidence is conflicting as to a breach of duty, on the part of the employee, it would be a question of fact for the jury, if the contributory negligence of such injured employee ought to defeat his recovery, as the approximate cause of his injury, and unless the evidence is all one way and reasonable minds could not differ as to the negligence of the employee, the court should submit this issue, under proper instructions, to the jury.²

§ 395. **When injuries from are assumed.** — The rule which subjects a mine employer to liability for injuries to his employees from falling slabs and bowlders is not without necessary limitations, in order to prevent abuses resulting from too broad an assertion of the rule. In mining, as in other vocations of life, it is necessary to employ skilled employees to handle different departments of the business and such employees are frequently better informed of the risks and necessities of their particular branch of the business than the employers themselves. To hold that such an employee, with full knowledge of the dangers and attendant risks, could rely upon his own judgment as to the liability of a given slab or bowlder to fall, and then,

¹ *Coal Co. v. Muir*, 20 Colo. 320; *Christner v. Coal Co.*, 146 Pa. St. 67; *Sugar Cr. Co. v. Peterson*, 177 Ill. 324.

² *Hammon v. Coal Co.*, 156 Mo. 232; *Treadwater Coal Co. v. Johnson*, 24 Ky. L. R. 1777; 72 S. W. Rep. 274. In *Crabtree Coal Co. v. Sample*, (Ky. 72 S. W. Rep. 24) the deceased was killed by slate, falling from the roof of defendant's mine and it was held to be a question for the jury, whether or not he was guilty of contributory negligence. If the duty of an injured employee was to keep the roof of a drift safe, he cannot recover by predicated the negligence of his employer upon a failure to keep a reasonably safe place. *Sandy River Canal Coal Co. v. Candill*, 60 S. W. Rep. 180.

after an injury, hold his employer for the resulting injury, would be to make the latter responsible for the lack of judgment of his employees, and this the law does not attempt to do.¹ In all the different trades and callings where others are employed, it is elementary law that if the employees possess equal or superior information to the employer, in regard to the danger from a given place or appliance, then, in case an injury results, without assurance or knowledge on the part of the employer, the employee is held, in law, to have assumed the risk, as an incident of his employment.² This well-known doctrine of the law of master and servant applies to injuries resulting from slabs and boulders in mines,³ as well as to other injuries, from different causes, in such vocation.

§ 396. Same — Knowledge of danger bars recovery. — Where a miner knows of a defect and the resulting danger, in the condition of the roof or sides of a drift or mine, as where he knows of a crevice, or fissure in the rock, unless the employer, or those representing him, give some assurance of the safety of the place, so as to enable

¹ *Rocchia v. Coal Min Co.*, 121 Fed. Rep. 451; *White, Mines & Mining Rem.*, Sec. 449, p. 594 and cases cited; *Trihay v. Brooklyn Lead Co.*, 4, Utah, 468; 15 Mor. Min. Rep. 535.

² *Watson v. Coal Co.*, 52 Mo. App. 366; *Reiter v. Winona Co. (Minn.)*, 75 N. W. Rep. 219.

³ *Olsen v. McMullen*, 24 N. W. Rep. 318; *Buswell Per Inj.*, Sec. 205, p. 343; *Brown v. Chattanooga Co.*, 47 S. W. Rep. 415. A skilled miner, on the day shift, who finds that a ledge of rock he had noticed the day before is "lagging" and has been drilled by the night shift, is guilty of contributory negligence preventing his recovery, in working under such ledge, without examination or testing it. *Cummings v. Helena Sm. & R. d. Co.*, 26 Mont. 434; 68 Pac. Rep. 852. See, also, *Bedford Quarry Co. v. Thomas*, 63 N. E. Rep. 880. Where there is nothing in the formation of ground to indicate that it is about to fall, an employee working near it and injured by its caving in, cannot recover, although it would have been safer, if shored or timbered. *Quinn v. Baird*, 172 N. Y. 631; 65 N. E. Rep. 1121.

the employee to rely upon their superior judgment and skill, he could not recover for an injury from the falling of such loosened rock.¹ This is but in keeping with the

¹ In *Aldrich v. Furnace Company* (78 Mo. 559), the court said: "If the deceased did know of the existence of the seam or crevice and the consequent danger, or if it was so patent that an ordinarily observant person, whether minor or not, would have discovered it, within the time deceased was at work on the bank, then such opportunity to know it would be held as knowledge whether, in fact, he knew it or not, and, in either case, his employer would not be liable." In *Watson v. Coal Co.* (52 App. 868), the plaintiff's husband was engaged in taking down a pillar of coal, known to be cracked, and the court said: "Even if the defendant knew of the condition of the stone, or might have known it by the exercise of ordinary care, the uncontroverted evidence is that deceased had the same knowledge. The deceased saw the seams indicating a partial displacement of the stone; he tested it by striking it with a pick; he was a man of mature years and an experienced miner. He must be presumed to have had the knowledge, which common observation forces upon the most ordinary intellect, to have known the effect and operation of the law of gravitation and that blasting in the neighboring columns and stubs would affect the superincumbent roof, of which the stone which subsequently fell, was a part. He must be presumed to know that from such causes the stone was likely to break away and fall down." In the above case the plaintiff himself was the active agency which broke up the particles of stone holding the slab, by cohesive attraction to the roof, and hence set in motion the natural law governing the object unable to resist it. *Petaja v. Aurora Min. Co.*, 82 L. R. A. 485. If the owner is liable for the result of an employee putting in operation a force that causes the rock to fall, then the master would be liable for an injury from an employee falling with a limb on which he might perch himself, while sawing it off next to the tree, for the one object would be no surer to fall than the other, and the servant himself, in both cases, would be the cause of the fall. Nor is the rule established by these cases, in this State, any departure from the general rule, but the same doctrine is announced in many other States. In Iowa, in the case of *Money v. Lower Vein Coal Co.* (55 Iowa, 671), it was held that a miner, who worked near a loose scale of coal without promise from the mine owner to change the condition and who was injured by such falling scale, assumed the risk and could not recover. See same case, 10 Mor. Min. Rep. 56. See, also, *Heald v. Wallace*, 71 S. W. Rep. 80. In *Hall, by next friend v. Johnson* (84 L. J. Ex. 222), Earle, C. J., held to the same doctrine and announced the non-liability of a mine owner for a falling rock about which the plaintiff was working, in the usual performance of his

general doctrine of assumption of risk, that if the servant has equal or superior means of knowledge to his master and continues his work, without complaint, until an injury, from causes that he fully understood, he assumes the risk, as an incident to his employment.¹ But mere knowledge of a defect in the roof or drift of a mine is not, usually, sufficient to defeat a recovery for a resulting injury, under the doctrine of assumption of risk, but both a knowledge of the defect and of the resulting danger therefrom is also essential, in order to bar a recovery for an injury from such a cause.²

duties. In *Swanson v. Lafayette* (Ind. 83 N. E. Rep. 1038), an injury from a falling sand bank near which plaintiff was working, was held to be an assumed risk, which furnished no cause of action. In *Brown v. Chattanooga Co.* (47 S. W. Rep. 415), although illiterate, the plaintiff was held to have assumed the risk from a falling ditch, in which he was at work, as the character of the soil was apparent to any man. A similar holding was announced in the case of *Griffin v. Ohio and C. Company* (24 N. E. Rep. 888), where the defect in the bank of earth was a clay seam, between the gravel, open to observation. So, in *Meikle v. C. & A. Company* (79 N. W. Rep. 22), a quarryman injured by a falling rock, loosened by a previous blast he had helped to put in, was held to have assumed the risk. And likewise in *Naylor v. C. & N. W. Co.* (11 N. W. Rep. 24), the injury was from a caving bank of earth near which plaintiff was at work and as the character of the soil was open to observation, he was held to have assumed the risk.

¹ Any injury from an open, obvious danger, which could have been observed, is an assumed risk, for which no recovery can be had. *Lanyon Zinc Co. v. Bell* (Kan.), 68 Pac. Rep. 609. *White Mines & Min. Rem.*, Sec. 452, p. 599.

² In *Hamman v. Central Coal & Coke Co.* (156 Mo., p. 243), Judge Burgess, speaking for the Missouri Supreme Court, said: "It is also contended that plaintiff's husband continued in the service of defendant for several days, with full knowledge of the dangerous condition of the roof, and thereby assumed the risk of its falling. Mere knowledge that the roof was unsafe and that risk was to be incurred in working under it, was not, as a matter of law, sufficient to defeat the plaintiff's action, if the danger was not such as to threaten immediate injury, or if it was reasonable to suppose the room might be safely used, by the exercise of care." See also, *Fisher v. Lead Co.*, 156 Mo. 479; *Smith v. Coal Co.*, 75 Mo. App. 177; *Hamilton v. Mining Co.*, 108 Mo. 864. In holding that the

§ 397. Same — Knowledge of natural laws presumed. — As before observed, it is the general rule that those engaged in making excavations, where the dangerous nature of the work is a matter of common observation, assume the risk of injuries from falling earth and rock, loosened by the work of excavation.¹ To hold the employer liable in such a case would be to make of him an absolute insurer, not only of the safety of the place where his employee is at work, but also of the carefulness of the work of such employee, himself, as the place of work is continuously changed by the prosecution of the work, by the employee. The law does not place this harsh rule of liability upon the employer of men engaged in making ex-

danger must be imminent, the above cases do not seem to announce the correct rule on the doctrine of assumed risk in Missouri. "A risk which one skilled in the business could not foresee, is assumed." *Beasley v. Transfer Co.*, 148 Mo. 418. And not only *obvious* dangers, but all others, incident to the business, are assumed. In speaking of a modified instruction, which so placed the matter before the jury, the Supreme Court of Missouri, in *Minnier v. Sedalia*, observed: "The effect of the modification is to tell the jury that a servant only assumes such risks as are so obvious and dangerous as to threaten immediate injury. This is not the whole law on the subject, and stated in this way, it is not the law at all. For it overlooks the rule that the servant assumes the risks ordinarily and usually incident to the employment. It calls attention to the exception to the rule but does not state the rule, and stated as those instructions put it, it makes the exception to the rule, the rule itself." *Minnier v. Sedalia & Co.*, 167 Mo., p. 117. But, as stated in the text, both knowledge of the condition and the attendant danger are essential to constitute assumed risk, in such a case, i. e., injury from falling slabs or bowlders. *White Mines & Min. Rem.*, Sec. 449, p. 555 and foot-note. "Mere notice that roof was not propped a few hours before injury, will not defeat recovery." *Cushman v. Carbondale Co.*, 88 N. W. Rep. 817; *Boyer v. Coal Co.*, 68 Pac. Rep. 348. Knowledge of defect and danger both essential. *Hamilton v. Coal Co.*, 108 Mo. 364; *Conroy v. Iron Works*, 65 Mo. 85; *Hamman v. Coal Co.*, 156 Mo. 232; *Fox v. White Lead Works*, 84 Mich. 676; *Graham v. Coal Co.*, 88 W. Va. 273.

¹ *Watson v. Coal Co.*, 52 Mo. App. 366; *Pioneer Min. Co. v. Thomas*, 82 So. Rep. 15; *White Mines & Min. Rem.*, Sec. 450, p. 595 and cases cited.

cavations. The law presumes not only that its own ever changing rules are known to every man, but it also charges all men alike with a knowledge of nature's fixed, immutable laws. This being true, an injury to an employee from coming in contact with a body subject to the force of gravitation, which he has himself subjected to such force, would be a risk incident to the service in which such an employee was engaged and one assumed by his service, for which no recovery could be had.¹

§ 398. **Same — Effect of master's order or assurance.** — The master is legally presumed to know more about the dangers incident to his own business than any of his employees, not possessing power of control over those engaged, and even though the danger from a loosened slab or boulder may be apparent to an employee, if the master or one to whom he has delegated the power of control of his other employees, gives such other employee assurances of the place, or orders him to work under such loosened or dangerous slab and the latter is injured as a result of such order or assurance, the master will be liable to such injured employee, although the danger was apparent, on account of the order or assurance, on the part of the employer, or his vice-principal, which has the effect of a guaranty of the safety of the place.² This rule is announced by the

¹ "Employees, while performing their duty, are bound to take notice of familiar natural laws and to govern themselves accordingly." *Reiter v. Winona &c. Co.* (Minn.), 75 N. W. Rep. 219; *Swanson v. Ry. Co.*, 70 N. W. Rep. 978. In *Watson v. Coal Co.*, 52 Mo. App. 368, "The deceased saw the seams indicating a partial displacement of the stone; he tested it by striking it with a pick; he was a man of mature years and an experienced miner. He must be presumed to have had the knowledge which common observation forces upon the most ordinary intellect, to have known the effect of the law of gravitation."

² A miner has a right to rely upon the foreman's assurance of safety, *Carter v. Baldwin*, 81 S. W. Rep. 204; *Faulkner v. Mammoth Co.*, 23 Utah.

Appellate Court, in Missouri, even though the employee noted a crevice above the loosened rock and called the foreman's attention to it.¹ But this decision is not a well considered case, as the employee there, was the active means that precipitated the slab down upon himself, by drilling just over the crevice and the Supreme Court of the same State has held that where this is true, an order is no protection to such injured employee,² and this is in accord with the weight of authority, in other States. It is only when the employee is ignorant of the impending danger and the employer, with full knowledge, fails to inform the employee, that the employer will be liable for an injury, and if the injured employee has equal or superior means of knowledge with the foreman, or vice-principal, and sees fit to continue in the performance of his duties, without objection, a mere request of the foreman should not render the employer liable for a resulting injury.³

437; 66 Pac. Rep. 800; *Homestake Co. v. Fullerton*, 69 Fed. Rep. 923; *Harder Co. v. Schmidt*, 104 Fed. Rep. 282; *Carleton Co. v. Ryan*, 29 Colo. 401; 68 Pac. Rep. 279; *East Jellico Co. v. Stewart* (Ky.), 68 S. W. Rep. 624; *Con. Coal Co. v. Wombacher*, 134 Ill. 57; 24 N. E. Rep. 627; *Worbach v. Home Min. Co.*, 58 Kan. 731; 37 Pac. Rep. 122; *Larson v. Mining Co.*, 71 Mo. App. 512; *Monahan v. Coal Co.*, 58 Mo. App. 68.

¹ *Carter v. Baldwin* (Mo. App. 1904), 81 S. W. Rep. 204.

² *Aldrich v. Furnace Co.*, 78 Mo. 559.

³ *Skidmon v. W. Va. Co.*, 23 S. E. Rep. 713; *Olsen v. McMullen*, 24 N. W. Rep. 818; *Meickle v. C. & N. Co.*, 79 N. W. Rep. 22; *Zentz v. Chappel* (Mo. App.), 77 S. W. Rep. 86; *Greene v. W. U. Co.*, 75 Fed. Rep. 250; *Welch v. Bainard* (Mich.), 65 N. W. Rep. 667; *Epperson v. Tel. Co.*, 155 Mo. 856. In *Reiter v. Winona and C. Co.*, (75 N. W. Rep. 219) where the complaint was based upon a negligent order of a foreman to work near a gravel bank, which caved in upon the plaintiff, the court held there was no liability. In *Welsh v. Bainard* (Mich. 65 N. W. Rep. 667), the same doctrine is affirmed. In *Green v. West. Union Co.* (72 Fed. Rep. 250), a negligent order of a foreman was held to furnish no liability for an injury from a falling telegraph pole. In *Pederson v. Rushford* (Minn. 42 N. W. Rep. 1068) a similar order furnished no cause of action, for an injury from a falling bank of earth, subject to natural laws. And see, *New Pittsburg C. & C. Co. v. Peterson*, 85 N. E.

§ 399. Same — When assumption of risk from, jury question. — It may be stated as a general proposition, applicable to all the different mining States, that where an employee has full knowledge of a defective condition of a slab or boulder and also of the dangers incident to working near the same, if he continues his work, without objection, and is injured, he will be held, in law, to have assumed the risk.¹ The same result follows from a defect which is open and obvious, where the law would charge him with a knowledge of the resulting danger, and in cases where he is fully cognizant of the danger, the court would, as a matter of law, hold that he had assumed the risk and take the case from the jury, on a peremptory charge.² Where, however, the employee is not shown to have a knowledge of the defect, resulting in his injury, or where

Rep. 7; *Watson v. Coal Co.*, 52 Mo. App. 366; *Aldrich v. Furnace Company*, 78 Mo. 559. In *Skidmore v. W. Va. Co.* (23 S. E. Rep. 713) it is said: "Where a foreman and his assistants have equal knowledge of the danger accompanying an act, about to be done, even if the foreman requests its performance, and injury ensues to the assistant, the employer cannot be made liable. Notwithstanding the request, the assistant can comply or not, as he chooses, and if he does comply, he takes his chances of the perils surrounding the situation. It is only when the servant is ignorant of the impending danger, and the employer is not, and the employer fails to warn the servant, of such danger, that the master's liability attaches." An employer is liable for the negligence of a foreman in turning to talk to a by-stander, at a time when an undercut of an earth bank had so far progressed as to make it dangerous to employees working under it and they were accustomed to be warned at such intervals. *Rafferty v. Nawn*, 182 Mass. 503; 65 N. E. Rep. 830. Where a mine foreman fails to take such precaution as is necessary to protect the roof of a mine, the owner is liable for resulting injury. *Coal Valley Min. Co. v. Haywood*, 98 Ill. App. 258.

¹ *Reiter v. Winona Co.*, 75 N. W. Rep. 219; *Welsh v. Brainard*, 65 N. W. Rep. 667; *Pederson v. Rushford*, 42 N. W. Rep. 1063; *Pittsburg Co. v. Pederson*, 35 N. E. Rep. 7; *Watson v. Coal Co.*, 52 Mo. App. 366.

² *Watson v. Coal Co.*, 52 Mo. App. 366; *Aldrich v. Furnace Co.*, 78 Mo. 559; *Skidmore v. West Virginia Co.*, 23 S. E. Rep. 713; *Epperson v. Tel. Co.*, 155 Mo. 356; *Olsen v. McMullen*, 24 N. W. Rep. 318.

it is not so open and obvious as to threaten immediate danger, but he is led to believe that by due care he can continue his work, without injury, then the question should be submitted to the jury, as to whether, under the particular circumstances of the case, the plaintiff did, or did not, assume the risk of injury, as an incident of his business.¹

¹ *Tennessee Co. v. Currier*, 108 Fed. Rep. 19; *Lindley v. Anchor Co.*, 20 Utah, 134; 58 Pac. Rep. 355; *Crabtree Coal Co. v. Sample* (Ky.), 72 S. W. Rep. 24; *Monahan v. Coal Co.*, 58 Mo. App. 68; *Larson v. Mining Co.*, 71 Mo. App. 512; *Carter v. Baldwin*, 81 S. W. Rep. 204; *Hamilton v. Mining Co.*, 108 Mo. 364; *Lucey v. Oil Co.*, 129 Mo. 32; 31 S. W. Rep. 840 (18 S. W. Rep. 977); *Hammon v. Coal Co.*, 156 Mo. 232; *Fisher v. Lead Co.*, 156 Mo. 479.

CHAPTER XVIII.

INJURIES FROM DEFECTIVE ROOF.

SECTION 400. Employer's duty regarding roof.

- 401. Newly excavated portions — Duty varies with.
- 402. Duty cannot be delegated.
- 403. Employer's knowledge of defect.
- 404. Employee's knowledge of defect.
- 405. Same — How affected by character of work.
- 406. Negligence of "pit boss" or foreman.
- 407. Employer's assurance of safety.
- 408. Removing pillars — Failure to warn.
- 409. What dangers from are assumed.
- 410. No liability when injury incidental to work.
- 411. Instructions regarding safety of roof.
- 412. Failure to inspect roof.
- 413. Failure to furnish props for.
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§ 400. Employer's duty regarding.— When a miner is placed at work in a room or drift of the employer's mine, the same general rule applies, with reference to the reasonable safety of the roof, above where the miner is required to work, that obtains in other vocations, and the employer's duty, as regards the place of work, requires the mine owner to see that the roof of drifts or rooms where his employees are at work, is kept in a reasonably safe condition.¹

¹ *Hammon v. Central Coal & Coke Co.*, 156 Mo. 232; *Carter v. Baldwin*, 81 S. W. Rep. 204; *Sinberg v. Falk Co.* (Mo. App. 1903), 72 S. W. Rep. 948. A mine owner is negligent in permitting the roof of a mine to become so dangerous that rocks will fall upon employees at a place they are known to pass across, in attending to their other duties. *Carson v. Coal Hill Co.*, 101 Iowa, 224; 70 N. W. Rep. 185. For injuries in failing to provide a reasonably safe roof, in coal mine, see *McNamara v. Logan* (Ala.), 14 So. Rep. 175; *Deweese v. Meramec Iron Co.*, 54 Mo. App. 476; *Winona Coal Co. v. Holmquist*, 51 Ill. App. 507; *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153; 27 Atl. Rep. 577.

And while the law furnishes no remedy for injuries from natural forces, put in operation by the act of the injured employee,¹ or where, by reasonable care, he could have avoided the same,² this rule does not exempt the master from liability for injuries which, by the exercise of reasonable care and prudence, on his part, could have been prevented.³

§ 401. Newly excavated portions —Duty varies with. — A mine owner is only required to keep the roof of the rooms and drifts in the mine as reasonably safe as the proper carrying on of the work will reasonably permit.⁴ As to newly excavated portions of the mine, the same standard of care does not apply, that obtains as to portions of the roof that have been formerly excavated, for until a newly excavated portion of the mine has been timbered, it is not such a "place of work," as to require it to be timbered, to be made reasonably safe.⁵ But after a roof has once been propped or timbered, a miner at work under it has the right to assume that such roof will be kept in a reasonably safe condition, and for an injury from a defective condition of the roof, due to a failure to trim or keep it in repair, the employer would be liable to such injured miner.⁶

¹ *Watson v. Coal Co.*, 52 Mo. App. 366.

² *Carter v. Baldwin*, 81 S. W. Rep. 204.

³ *Hammon v. Central Coal & Coke Co.*, 156 Mo. 232.

⁴ "An employer is only required to provide a place as reasonably safe as the proper carrying on of the work will reasonably permit." *Sinberg v. Falk Co.* (Mo. App. 1902), 72 S. W. Rep. 947.

⁵ Before a newly excavated portion of a mine can be timbered it is not such a "place of work" as to require it to be timbered to be made reasonably safe. *Peteja v. Aurora Iron Min. Co.*, 106 Mich. 469; 66 N. W. Rep. 951; 32 L. R. A. 488.

⁶ But where the room in which a miner is at work has been already timbered, then the miner has a right to rely upon the assumption that it will be kept reasonably safe. *Western Coal Co. v. Ingraham*, 70 Fed. Rep. 219.

§ 402. **Duty cannot be delegated.** — The duty of the mine employer to keep the roof of drifts or rooms in his mine in a reasonably safe condition, like the duty to furnish reasonably safe tools and appliances, cannot be delegated by him, to an agent, so as to avoid liability for an injury from the unsafe condition of such roof, for this would be to practically set aside the duty and relieve the employer therefrom.¹ Accordingly, when the employer places the duty of keeping the roof or walls of the mine in safe condition, upon a superintendent or vice-principal, who has the miners under his control, in the discharge of his duty he is held to represent the master, and his negligence, resulting in an injury, is held to be that of his employer.²

§ 403. **Employer's knowledge of defect.** — To constitute negligence in any case, sufficient to recover for an injury therefrom, the employer, or party guilty of such negligence, must have had knowledge of the condition causing the injury, or an opportunity to know such condition. Knowledge to an agent of the owner, however, is generally held to be knowledge to the employer, and where the foreman³ or mining boss,⁴ placed by the master in charge of his mine, has knowledge of a defective or dangerous roof, or has had reasonable opportunity for knowledge, his notice, or want of notice, is chargeable to his employer and the latter is liable, in case of a resulting injury. In an Illinois case,⁵ where a coal miner was killed by a rock

¹ *Walte Mines & Min. Rem.*, Ser. 451, p. 597 and cases cited.

² *Wellston Coal Co. v. Smith* (Ohio), 10 Amer. Neg. Rep. 44.

³ *Coal Valley Min. Co. v. Haywood*, 98 Ill. App. 258; *Consolidated Coal Co. v. Lundak*, 196 Ill. 594; *Harder Coal Co. v. Schmidt*, 9 Amer. Neg. Rep. 227.

⁴ *Wellston Coal Co. v. Smith* (Ohio), 10 Amer. Neg. Rep. 445; *Mining Co. v. Schnelling*, 1 Amer. Neg. Rep. 782.

⁵ *Quincy Coal Co. v. Hood*, 77 Ill. 69.

falling from the gangway of the roof, it was held that notice to the superintendent of the dangerous condition of the roof, was notice to the company, and if such notice had existed a sufficient length of time to have enabled the company to repair the roof, the company would be chargeable with negligence, and this is a clear statement of the general rule upon the subject.¹

§ 404. **Employee's knowledge of defect.** — The knowledge, or means of knowledge, on the part of an employee, of a defective condition of a roof in a mine, is often of great importance in determining whether or not he assumed the risk of injury therefrom. Generally, where an employee has equal or superior means of information, to that of his employer, he is held to assume the risk,² and this is the rule with reference to a defective roof in a mine,³ and if the defect is obviously suggestive of danger, the knowledge of the danger is legally presumed, upon the employee's part.⁴ In a recent Missouri case, the Court of Appeals, however, held that although a miner knew of a crevice above a boulder, and was familiar with the service and knew it was liable to fall, he did not assume the risk of injury, if the foreman gave him any assurance of safety.⁵ And the Supreme Court of Missouri also held, in a recent case, that knowledge on the part of a coal miner,

¹ *Bunker Hill Min. Co. v. Schnellling*, 1 Amer. Neg. Rep. 782; *Ashland Coal Co. v. Wallace*, 4 Amer. Neg. Rep. 88; *Coal Valley Min. Co. v. Haywood*, 98 Ill. App. 258; *Coal Co. v. Lundak*, 196 Ill. 594; *Hammon v. Coal & Coke Co.*, 156 Mo. 282; *Wellston Coal Co. v. Smith*, 10 Amer. Neg. Rep. 445; *White Mines & Min. Rem.*, Sec. 451, p. 597.

² *Watson v. Kansas & Texas Coal Co.*, 52 Mo. App. 866; *Aldrich v. Furnace Co.*, 78 Mo. 559.

³ *White Mines & Min. Rem.* Sec. 451, p. 597 and cases cited.

⁴ *Balley's Mat. Liab. Inj. Serv.*, p. 165.

⁵ *Carter v. Ba'dwin*, 81 S. W. Rep. 204. The author endeavored to prevent this precedent.

that the roof of the mine was defective, to the extent that risk is incurred in working under it, will not, as a matter of law, defeat the action, if the danger is not such as to threaten immediate injury, but it is reasonable to suppose the work can be safely continued with proper care.¹ Practically a similar rule is adopted in Illinois, where it is held that the miner cannot make an express contract to assume the risk of injuries from a defective roof in a mine, arising from a failure, on the employer's part, to adopt proper precautions to keep such roof reasonably safe.²

§ 405. Same — How affected by character of work. — The master's duty, as regards the place of work, in the general law of master and servant, finds some exceptions, in the application to the present subject, for while the master's general duty, as to the place of work, is not varied, in those vocations where the character of the work does not affect the place, since in mining operations the very object of the work is to continuously change the place of work, by excavations and mining, the risk of injury, where this is true, as an incident to his service, is within the well-established limits of the miner's implied contract of the common law, with reference to assumed risks, and for an injury resulting from the changed condition of the work performed, there could be no recovery.³

¹ *Hammon v. Central Coal & Coke Co.*, 156 Mo. 282. The case is in conflict with the later case of *Minnier v. Sedalia sp. Co.*, 167 Mo. 94, where incidents of risks are held assumed, although not threatening "immediate injury."

² *Consolidated Coal Co. v. Lundak*, 97 Ill. App. 109; 196 Ill. 594.

³ *Aldrich v. Furnace Co.*, 78 Mo. 559; *Watson v. Coal Co.*, 52 Mo. App. 366; *Parker v. Silver Cr. Co.*, 84 Wis. 424; *Amrst v. Steele Co.*, 173 Pa. St. 165; *Bradley v. C. & M. Co.*, 138 Mo. 294; *Kennedy v. Grace*, 93 Fed. Rep. 116; *Allan v. Logan*, 37 Pac. Rep. 486; *Naylor v. C. & N. W. Co.*, 27 N. W. Rep. 24; *Mielke v. C. & N. W. Co.*, 79 N. W. Rep. 22; *Brown v. Chattanooga Co.*, 47 S. W. Rep. 415; *Vincennes v. White*, 24 N. E. Rep. 745; *Swanson v. Lafayette*, 33 N. E. Rep. 1033; *Griffin v. Ohio Co.*, 24 N.

§ 406. Negligence of "pit boss" or foreman.—As in other injuries, traceable to the carelessness or negligence of a "pit boss," or foreman, for an injury to a miner, resulting from the negligence of such a representative of the employer, which occasioned a dangerous condition of the roof, an action would lie in favor of such injured employee,¹ but in those jurisdictions where such "boss" or foreman is held to be a fellow-servant with the injured employee, no recovery could be had from the employer for an injury from a defective roof, traceable to his negligence.²

§ 407. Employer's assurance of safety.—While an employee is generally held to assume the risk of injury from a dangerous roof, of which he had full knowledge, or where the defects or dangers were obvious,³ where the nature of the defect is not thoroughly understood and the resulting danger therefrom fully appreciated, the employee is held not to assume the risk, if he is persuaded to remain at his work by reason of an order or assurance of safety from his employer.⁴ In a recent decision by the Court of Appeals, in Missouri, a miner, of ordinary experience, had

E. Rep. 888; *Pederson v. Rushford*, 42 N. W. Rep. 1063; *Olsen v. McMullen* 24 N. W. Rep. 813; *Rasmussen v. Ry. Co.*, 21 N. W. Rep. 588; *Reiter v. Winona Co.*, 75 N. W. Rep. 219; *White Mines & Min. Rem. Sec.* 450, p. 595.

¹ *Hammon v. Coal Co.*, 156 Mo. 232; *Carter v. Baldwin*, 81 S. W. Rep. 204. "In an action by a miner to recover for injuries resulting from falling rocks, evidence of specific acts of incompetency of the pit boss, and that he did not have regard for the lives of men under his charge, is admissible under a general allegation that he was ignorant and incompetent." *Green v. Western American Co.*, 70 Pac. Rep. 310.

² *Alaska Treadwell Gold Min. Co. v. Whelen*, 168 U. S. 85.

³ *Watson v. Coal Co.*, 52 Mo. App. 366; *Hammon v. Central Coal & Coke Co.*, 156 Mo. 232; *White Mines & Min. Rem.*, Sec. 451, p. 597, and cases cited.

⁴ *Carter v. Baldwin*, 81 S. W. Rep. 204.

observed a large crevice, extending across the roof of a drift, over a ledge of rock; he was ordered, by the employer's foreman, to drill a hole directly over such crevice a distance of three inches and was assured of the safety of such roof; he had drilled but three or four inches when the slab of rock fell upon him, but because of such assurance of safety the court held he was entitled to recover.¹

§ 408. **Removing pillars — Failure to warn.** — Whenever the injury to an employee is occasioned by the negligence of his employer and the employee was ignorant of the conditions which caused the danger to him, the employer is generally held liable for such an injury.² It is also the master's duty to give his employees, ignorant of a dangerous condition of the ways or work, a reasonable warning of such danger, or to inform them of the facts of which he was informed and they were ignorant, and for a failure so to do the master is guilty of such a breach of duty as to render him liable.³ Under this general rule, applied to an unsafe roof, due to a removal of the pillars, necessary to support the roof, it has been held in Utah, that the duty to inform a miner of the removal of such pillars is incumbent upon the employer, and for an injury from a failure to give due and timely warning of the removal of pillars, whereby the roof is caused to cave in, the employer is liable in damages.⁴

¹ *Carter v. Baldwin*, 81 S. W. Rep. 204.

² *Bailey's Mas. Liab. Inj. Serv.*, p. 156.

³ *Fox v. Peninsular White Lead Works*, 48 Mich. 676; 48 N. W. Rep. 208.

⁴ *Cunningham v. U. P. Co.*, 4 Utah, 206; 7 Pac. Rep. 795. In *Watson v. Coal & Coke Co.* (52 Mo. App. 366), an experienced employee, engaged in removal of pillars, supporting a roof, is held to assume the risk of the roof falling.

§ 409. **What dangers from are assumed.** — A miner of ordinary experience is held to assume the risk of injuries from causes incident to the ordinary manner of conducting that business ¹ and the risk of falling slabs or bowlders is no exception to the rule, and an experienced miner is held to assume the risk of injury from the falling of rock or mineral, where the falling of such rock or ore is liable to happen in the ordinary course of the work.² Injuries due to defects of which the servant had full information are usually held to be assumed risks³ and the falling of the roof of a tunnel, which has been properly inspected, is held to be a risk incident to the service.⁴ A roof which was rendered defective by recent rains is an obvious condition of the work, or place, held to be assumed by the miner,⁵ and whenever the fall of the roof is due to an act of the injured employee, or his fellow-servants, rather than the negligence of the employer, the injured employee is held to assume the risk.⁶

§ 410. **No liability when injury incidental to work.** — Where the dangerous nature of a miner's work is open to common observation and the injury received is due to the unsafe condition of the roof, caused by the progress of the work of the injured employee and his fellow-servants, the miner could not recover for an injury from falling rock from the roof.⁷ To hold the master liable for damages for

¹ Balley's Mas. Liab. Inj. Serv., p. 151.

² Paule v. Florence Mining Co., 80 Wis. 350; 50 N. W. Rep. 189.

³ Aldrich v. Furnace Co., 78 Mo. 559; Watson v. Coal Co., 52 Mo. App. 366.

⁴ Davis v. Coal & Coke Co., 84 W. Va. 500; 12 S. E. Rep. 530.

⁵ Western Stone Co. v. Musiale, 85 Ill. App. 82.

⁶ See, where fall of stone was due to employee tapping roof, Massie v. Peel Splint Coal Co., 41 W. Va. 620; 24 S. E. Rep. 644.

⁷ Curley v. Huff, 5 Amer. Neg. Rep. 668; Syndicate v. Murphy (Ky.), 60 S. W. Rep. 182; Quilm v. Baird, 7 Amer. Neg. Rep. 712; Western

such an injury would be to make of him an insurer of the safety of his employees and to indemnify them against injuries caused by a natural law, which everyone is presumed to know.¹

§ 411. **Instructions regarding safety of roof.** — Where the injury to a miner was due to an obvious danger or defect in the roof,² or was caused by the nature of the work of excavation,³ the cause ought to be taken away from the jury's consideration by the court and a peremptory instruction given for the defendant. But if the danger or defect in the roof was not obvious, or it did not result from the natural progress of the work, then the cause should be submitted to the jury to pass upon the issue as to the reasonably safe condition of the roof,⁴ and if the defense is assumed risk, the question should be submitted, in Missouri, whether or not a reasonably prudent person would have remained at work, and sustained the injury.⁵ If the defense is contributory negligence, the issue as to the approximate cause of the injury and whether or not the act of the plaintiff or the defendant's negligence occasioned it, should be submitted.⁶ Where the evidence as to the negligence is conflicting, however, it is error to instruct the jury that the mine owner is liable for the act of his agent, in charge of mine, for an injury due to falling

Stone Co. v. Musiale, 85 Ill. App. 82; *Cradley v. C. & M. Co.*, 138 Mo. 294; *Aldrich v. Furnace Co.*, 78 Mo. 559; *Watson v. Coal Co.*, 52 Mo. App. 366; *Buswell Per. Inj.*, Sec. 205, p. 343; *Parker v. Silver Co.* 4 Wis. 484.

¹ *White, Mines & Min. Rem.*, Sec. 450, p. 596, and cases cited.

² *Aldrich v. Furnace Co.*, 78 Mo. 559.

³ *Watson v. Coal Co.*, 52 Mo. App. 356.

⁴ *Hamman v. Central Coal & Coke Co.*, 156 Mo. 232.

⁵ *Hamman v. Coal & Coke Co.*, *supra*.

⁶ *Cushman v. Fuel Co.*, 88 N. W. Rep. 817; *Boyer v. N. P. Coal Co.* (Wash.), 68 Pac. Rep. 348.

slate¹ and for an injury due to falling coal, it is also error to instruct the jury that the sole question for determination is whether or not the coal would have fallen of its own weight, if not braced, as the real issue is, whether or not the defendant in the exercise of due care, could have anticipated and avoided the injury.²

§ 412. **Failure to inspect roof.** — On account of the great danger resulting from a miner's position under overhanging slabs and boulders, likely to be loosened by the work of excavation, the employer's duty of inspection, applies peculiarly to dangerous roofs of drifts and rooms in mines and for a failure to inspect the roof, in case of a resulting injury, the employer would be held responsible.³ Nor would the mere proof of an inspection be sufficient to release the mine owner of liability for an injury from falling rock from the roof of a drift, unless the inspection is shown to have been a proper and careful one, as the liability results from a careless inspection, the same as though none had been made at all.⁴ But a failure to inspect would not render the employer liable, where the danger was obvious and the employee had the same knowledge, or means of knowledge, as the employer, as the law

¹ *Carson v. Coal Co.* (Iowa), 1 Amer. Neg. Rep. 230; *Ewell v. Min. Co.* (Utah), 9 Amer. Neg. Rep. 639.

² *Freeman v. Coal Co.* (Mont.) 64 Pac. Rep. 347.

³ *White Mines and Min. Rem.*, Sec. 458, p. 605; *McCune v. Gallagher*, (N. Y.) 2 Amer. Neg. Rep. 613; *Benzing v. Steinway*, 101 N. Y. 550; *Hamman v. Coal Co.*, 156 Mo. 232. A mine owner is liable to a miner injured by a falling slab, if there has been no inspection, if the defect could have been discovered by a proper inspection. *Davis v. Coal Co.*, 34 W. Va. 500; 12 S. E. Rep. 539; *McMitten Marble Co. v. Block*, 89 Tenn. 118; 14 S. W. Rep. 479; *Sampson Mining Co. v. School*, 15 Colo. 197; 23 Pac. R. p. 89. But see, where injured employee and others inspected place, *Con. Coal Co. v. Young*, 31 Ill. App. 417.

⁴ *Con. Co. v. Parker*, 100 Ind. 181; *Durkin v. Sharp*, 88 N. Y. 225; *Egan v. Ry. Co.*, 42 N. Y. Supp. 188.

does not require a useless act and to inspect or warn an employee of what he already knew, would be a useless ceremony.¹

§ 413. **Failure to furnish props for roof.** — Independently of a prescribed statutory duty upon the subject, it would be such a breach of the common law duty, on the part of a mine employer, to fail to properly shore up or timber a dangerous roof in his mine, as to constitute actionable negligence, sufficient to enable an injured employee to recover.² Statutes have been passed in most of the mining States, however, with the object of insuring the protection of miners, in this regard, by requiring all mine owners to furnish timbers or props when required and to send them down into the mine.³ When the timbering should follow immediately after the excavations, to keep the roof reasonably safe, a failure to timber, within a reasonable time, is sufficient evidence of negligence, in

¹ *Aldrich v. Furnace Co.*, 78 Mo. 559; *Watson v. Coal Co.*, 52 Mo. App. 356. Where the roof of a mine or tunnel has been properly inspected, it is held, in West Virginia, that an injury thereafter resulting is assumed. *Davis v. Nuttallsburg Coal & Coke Co.*, 34 W. Va. 500; 12 S. E. Rep. 534; and see, also, *Western Stone Co. v. Musiale*, 85 Ill. App. 82.

² “Where plaintiff was injured by the fall of stone from the roof of a mine into which he was directed to go while assisting defendant’s surveyor in locating an entry, the facts that the roof of the mine was not supported by props at the point where it fell, and that the material overhead was shelly, full of seams, cracks, etc., were sufficient to establish negligence on the part of the mine owner in failing either to properly inspect or support the roof.” *Wilson v. Alpine Coal Co.*, 81 S. W. Rep. 278. *White Mines & Min. Rem.*, Sec. 463, p. 611; *MacSwinnney on Mines*, p. 612; *Bar. & Adams on Min in U. S.*, p. 788; *Trihay v. Brooklyn Co.*, 15 Mor. Min. Rep. 535.

³ See chapter *Statutes Regarding Safety of Miners*. See also Pa. Act, March 31, 1870; Ohio R. S. 6871; R. S. Mo. 1899, 8805; Iowa Laws 1880, ch. 202; Colo. Sess. Laws, 1885, pp. 137, 141; Ind. Act. March 2, 1891; *Horner’s Rev. St.* 1897, Sec. 5480m.

case of an injury, to render the employer liable.¹ The duty to furnish props cannot be delegated, so as to avoid liability for an injury from a failure to provide them.² Under most of the statutes, however, the employer's duty is discharged when a sufficient supply of timbers is provided, as it is the duty of the employees to utilize them, when occasion demands;³ and a failure to use props, after they were provided, in Missouri, would be such contributory negligence as would prevent a recovery;⁴ but under the Illinois statute, it is held that neither assumed risk or contributory negligence is a defense to an action for breach of the statutory duty.⁵ In Indiana,⁶ Pennsylvania,⁷ Colorado,⁸ and Ohio,⁹ contributory negligence is a defense to such an action, and, manifestly, it should be, for, in such case, the master's negligence is not the cause of the injury.¹⁰ Under most of the statutes a demand for props, or knowledge of the necessity therefor, on the part of the owner, is essential,¹¹ and, in some of the States, continuing to work, with a knowledge of the absence of props and the resulting danger, would constitute an assumption of risk, on the part of the miner.¹²

§ 414. **Pleading actions for injuries from.**—The rule permitting the allegation of negligence in general terms,¹³

¹ *Trihay v. Brooklyn Co.*, 15 Mor. Min. Rep. 585.

² *Coal Min. Co. v. Clay*, 51 Ohio, 541; *White Mines & Min. Rem.*, Sec. 468, p. 612.

³ *Victor Coal Co. v. Muir*, 20 Colo. 820.

⁴ *Leslie v. Coal Co.*, 110 Mo. 81; *Spiva v. Coal Co.*, 88 Mo. 68; *Adams v. Coal Co.*, 85 Mo. App. 685.

⁵ *Coal Co. v. Patting*, 71 N. E. Rep. 371.

⁶ *Wooley Coal Co. v. Bracken*, 66 N. E. Rep. 775.

⁷ *Christoer v. Coal Co.*, 146 Pa. St. 67;

⁸ *Victor Coal Co. v. Muir*, 20 Colo. 820;

⁹ *Pittsburg Coal Co. v. Estlevenard*, 40 N. E. Rep. 726; 58 Ohio, 48.

¹⁰ *Dresser Emp Liab.*, Sec. 51.

¹¹ *Leslie v. Coal Co.*, 110 Mo. 81; *Pittsburg Coal Co. v. Estlevenard*, *supra*.

¹² *Pittsburg Coal Co. v. Estlevenard*, *supra*.

¹³ *Bliss Code Pleading* (2 Ed.), Sec. 70.

permits one injured by reason of a defective roof of a mining drift to set forth the negligence in general terms and it has been held sufficiently definite to allege that the defective condition of the roof resulted from the negligence of the mine owner, without an allegation that the owner knew of such condition, for this is included in the allegation of negligence, which would comprise either knowledge or a condition existing for a length of time from which notice would be inferred.¹ But a complaint will be defective which does not clearly set forth that the complainant was an employee of the defendant, for without such an allegation or an equivalent one, from which it would appear that the defendant owed the plaintiff some duty, which was violated, the complainant would fail to show a cause of action, since the basis of the plaintiff's right is a violated duty owed him by the defendant.² And under a complaint alleging only a failure to repair and to prop and timber a roof, the further allegation of a duty of inspection, when the evidence shows that the slate in the roof would be liable to fall in from three to six days after it became loose, but there is no evidence as to when

¹ "Where, in an action for injuries to a servant by the falling of stone from the roof of a mine, the petition alleged that the mine was in an unsafe and dangerous condition by reason of the carelessness and negligence of defendant, it was sufficient without an allegation that defendant knew of the unsafe and dangerous condition of the mine." *Wilson v. Alpine Coal Co.*, 81 S. W. Rep. 278.

² "A count in a complaint for injuries to a servant alleging that intestate was killed by reason of the negligence of a person whose name was unknown to plaintiff, who was in defendant's service or employ, and whose orders and directions plaintiff's intestate at the time of his death was bound to conform, and did conform, and that intestate's death resulted from his having so conformed, was demurrable for failure to charge that intestate was an employee of defendant at the time he was killed, or any other fact, except inferentially, showing that defendant or its employee owed intestate any duty." *Logan v. Central Iron & Coal Co.* (Ala., 1904), 36 So. Rep. 729.

the defect was actually discovered by the defendant, the plaintiff will not be entitled to recover.⁸

¹ "In an action by an employee in a coal mine for injuries sustained owing to a fall of slate from the roof of an entry, the complainant alleged that it was defendant's duty to examine and inspect the roof, but the only charge of negligence was in allowing the roof to become out of repair, and failure to prop and timber it as required by law. *Held*, that under the pleadings evidence that the slate would be liable to fall from three to six days after it became loose, unaccompanied by testimony as to when the defect was actually discovered by defendant, was insufficient to make out a case." *Thayer v. Smoky Hollow Coal Co.* (Iowa, 1908), 96 N. W. Rep. 718.

CHAPTER XIX.

INJURIES FROM HOISTING APPLIANCES.

SECTION 415. Statutes regulating such appliances.

416. Evidence of negligence and contributory negligence regarding.

417. Miner failing to signal assumes risk.

418. Miner should look for descending cage.

419. Failure to repair hoisting apparatus.

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421. Breaking of hoister rope.

422. Same — When miner assumes risk of.

423. Negligence of fellow-servant operating.

424. Same — Negligence of superintendent or foreman.

425. Incompetent "holster-man" or "cager."

426. Independent contractor operating.

§ 415. Statutes regulating such appliances. — In an early English case, it was held to be the duty of "one who let workmen down into his mine, to bring them up safely."¹ In furtherance of this common law declaration of duty, on the part of the mine owner, with reference to the means of hoisting and lowering persons into the mine, statutes have been passed, in many of the mining States, requiring particular kinds of appliances for the purpose, adapted to the character of the mining operations and designed to preserve the safety of the miner.² Under the English statute, requiring a cage, with guides, a mine owner, who furnishes a bucket, in violation of the stat-

¹ *Brydon v. Stewart*, 2 Macq. Sc. App. 30; B. & W. L. C., p. 632.

² The Missouri Coal Mine statute, requires a "cage covered with boiler iron." Laws Mo. 1901, p. 211; see Ill. Act. 1873, ch. 98; Hurd's R. S. Ill., 1901, p. 1202; California Civil Code, 1881; Pa. Act. June 2, 1891; Eng. Met. Miners Act, 1872; Horner's R. S. Ind. 1897, Sec. 5480j.

ute, was liable to a prosecution.¹ A tub or bucket, three feet across, hung upon a rope, has been held not to be a compliance with the Pennsylvania statute of 1891, requiring a covered cage with guides,² and such violations of the statute, in case of a resulting injury, are held to be prima facie evidence of negligence, upon the part of the mine owners.³ To entitle an employee to recover, however, for an injury from a violation of such a statute, the violation of the statute must be the approximate cause of the injury and the injured employee must bring himself within the protection of the statute. The Supreme Court of Missouri recently denied to an employee, injured as a result of a defective derrick, the benefit of the Missouri statute, governing the hoisting and lowering of persons into the mine.⁴ A miner who had just stepped upon a cage, in Illinois, however, was held entitled to the protection of the statute of that State, preventing the hoisting of coal, while a miner was being "hoisted or lowered into the mine,"⁵ and the Appellate Court of Indiana holds that a miner, running cars, at the bottom of the mine, is within the protection of the "cage statute" of that State, designed to apply to the hoisting and lowering of persons into and out of the mine, although such miner, when injured, is neither ascend-

¹ *Foster v. Mining Co*, 1 Q. B. 71.

² *Commonwealth ex rel. Elk Hill Coal Co.*, 4 Lack. L. News, 80.

³ *Spiva v. Coal Co.*, 88 Mo. 68; *Block Coal Co. v. Cuthbertson*, 67 N. E. Rep. 558; *Brower v. Locke*, 67 N. E. Rep. 1015. Although no mineral has been excavated, a shaft where men are at work is a "working shaft," under the English Metalliferous Mines Act, and a bucket, unprovided with guides, is a violation of the statute. *Foster v. North Hendre Min. Co.*, 1 Q. B. 71; 60 L. J. M. C. N. S. 6; 68 L. T. N. S. 458.

⁴ *Barrow v. Missouri Lead & Zinc Co.*, 72 S. W. Rep. 534. For instructions as to miner's duty to keep hoisting appliance and shaft in reasonably safe condition, see *Knight v. Sadler Lead & Zinc Co.*, 91 Mo. App. 574.

⁵ *Litchfield Coal Co. v. Taylor*, 81 Ill. 591; 10 Mor Min. Rep. 684.

ing or descending into such shaft.¹ If the owner is only made liable for a willful disregard of the statute, then an intent to violate it must be shown, to create a valid cause of action, in favor of the injured miner,² and if the negligence of the miner injured contributed to produce the injury, the employer would not be liable,³ although assumption of risk is not, generally, a good defense, upon the part of the mine owner who has failed to comply with such a statute.⁴

§ 416. **Evidence of negligence and contributory negligence.** — Where there is a statute, prescribing the kind and character of hoisting appliance necessary, in a given case, the statute itself furnishes the proper test and standard of care, on the part of the mine owner, and a failure to furnish the kind of hoisting apparatus required by the statute, would be negligence, regardless of what a reasonable man, independently of the statute, would have done.⁵ In the absence of a statute, upon the subject, then the proper question is, not whether there were safer or newer appliances in use, but whether the appliance which occasioned the injury, was reasonably safe, for the purposes for which it was used.⁶ Where a miner is riding in a

¹ *Bodell v. Brazil Block Coal Co.*, 25 Ind. App. 654; 58 N. E. Rep. 856. This is not a well considered case, for to give such application to the statute, one could as well apply it to a miner located at the face of the drift.

² *Odin Coal Co. v. Denman*, 84 Ill. App. 190; 57 N. E. Rep. 192; *Leslie v. Rich Hill Coal Min. Co.*, 110 Mo. 23.

³ *Durant v. Coal Co.*, 97 Mo. 66; *Adams v. Coal Co.*, 85 Mo. App. 493; *Dresser Emp. Liab.*, pp. 602, 603.

⁴ *Durant v. Coal Co.*, 97 Mo. 66; *Green v. Amer. Coal Co.*, 30 Wash. 87; 70 Pac. Rep. 310; *Coal Co. v. Swaggerty*, 159 Ind. 664; 65 N. E. Rep. 1026; *Spring Valley Coal Co. v. Patton* (Ill.), 71 N. E. Rep. 371.

⁵ *Deserant v. Cerillos Coal Co.*, 178 U. S. 409; 44 L. Ed. 1127.

⁶ "In an action for injuries to a miner from alleged defects in hoisting machinery, an objection to a question, asked in rebuttal, as to whether a properly constructed appliance would have prevented an occurrence

cage, in the performance of his duty and by reason of some cause, beyond his control, he is precipitated from the cage and killed, unless the cause of his injury was traceable directly to an act of a co-employee, his representative would not be denied a recovery by reason of the negligence of a fellow-servant and his own negligence would not preclude a recovery by his representative, unless it could be shown that some act on his part contributed to his death.¹

§ 417. **Miner failing to signal assumes risk.**—The danger attendant upon the hoisting and lowering of persons into mines, is so great, even when conducted with the utmost care and caution upon the part of those so engaged, that the law requires from miners being hoisted out of mines and those lowered into the shafts, the ordinary care and caution required of an employee of ordinary experience, engaged in a dangerous calling. Proper and ordinary precaution would suggest some communication, by signals, or otherwise, between the miner about to ascend or descend into a mining shaft, with those on the surface, or in the mine, and such precaution is required, on the part of a miner in the exercise of ordinary care for his own safety.² A miner, ascending a shaft, without having communicated with the hoister man, by signal, or without notice or warning of any kind to those in charge of the hoisting appliance, upon the surface, assumes the risk of injury while

similar to that occasioning the accident, was properly sustained." *Luman v. Golden Ancient Channel Min. Co.* (Cal. 1908), 74 Pac. Rep. 807.

¹ "Evidence held insufficient to show any contributory negligence of a mine employee in riding in a cage where he had a right to be, over the movements of which he had no control, ending in his being thrown from the cage down the mine shaft and killed." *Beresford v. American Coal Co.* (Iowa, 1904), 98 N. W. Rep. 902.

² *Snyder v. Mining Co.*, 26 Pac. Rep. 127; *Quick v. Minn. Iron Co.*, 47 Minn. 861; 51 N. W. Rep. 244.

being noisted from such shaft,¹ and the mere act of going into a shaft where a noiseless cage is liable at any time to be lowered or raised, without giving some signal or warning to those operating such cage, has been held to be contributory negligence sufficient to preclude a recovery in case of injury.²

§ 418. Miner should look for descending cage. — Analogous to the duty established by the courts, upon the part of travelers and employees, in regard to approaching railroad cars, to “look and listen” for such dangerous vehicles, the courts have recognized, upon the part of miners, engaged in underground work, a similar duty to anticipate, or look for the approach of the cage, or other conveyance, used to raise or lower the miners into and out of the mine.³ The shaft is constructed principally to accommodate the hoisting appliance, just as the roadbed of a railroad and the rails are made to facilitate the running of trains of cars to transport persons and property; both are similarly dangerous appliances and those familiar with their use should govern themselves accordingly and observe due caution to avoid injury therefrom. An experienced miner who enters a mining shaft, where a cage is known to be in operation, without looking for the cage, is guilty of such contributory negligence, that in case of an injury from being struck by the descending cage, he cannot recover from the mine owner.⁴

¹ A miner who ascends a shaft, without signaling, and, as a result, is injured by a drill being lowered into the mine, assumes the risk, *Snyder v. Mining Co.*, 26 Pac. Rep. 127.

² Going into a shaft, where a noiseless cage works, without signalling, is contributory negligence, preventing a recovery. *Quick v. Minn. Iron Co.*, 47 Minn. 361; 50 N. W. Rep. 244.

³ *Richert v. Stephens*, 133 Pa. 538; 19 Atl. Rep. 410.

⁴ *McDonald v. Rockhill Iron Co. (Pa.)*, 19 Atl. Rep. 797; *Richert v. Stephens*, 133 Pa. 538; 19 Atl. Rep. 410.

§ 419. **Failure to repair hoisting apparatus.** — The employer's duty as regards appliances, obtains not only to the original fitness of the appliance, but to its maintenance in a reasonably safe condition as well, and for an injury from a failure to repair, the employer is, in general, responsible to the injured employee.¹ If a hoisting apparatus, therefore, is out of repair and occasions an injury to an employee and the want of repair had continued a sufficient length of time to have enabled the employer to have notice of such necessity for repair he has been held guilty of such negligence, in failing to repair such appliance, as to render him liable to the injured employee.² But a failure to repair, like any other negligent act, must be the real or approximate cause of the injury to the plaintiff, to hold the master liable therefor, and if, instead of being due to a lack of repair, the injury is traceable to the negligent act of a fellow-servant, in charge of the hoister, the mine owner would not be liable for such an injury.³

§ 420. **Mine should be free from obstructions.** — The act of hoisting and lowering workmen into a mine is, from its very nature, attendant with such risks, that the employer is bound, as far as possible, to provide for the safety of his men, by seeing that the shaft is free and clear from obstructions, likely to come in contact with the cage,

¹ *Morgan v. Mining Co.*, 26 Utah, 174; 72 Pac. R. p. 688; *Sherman v. Menominee Co.*, 72 Wis. 122; 89 N. W. Rep. 865.

² *Morgan v. Mammoth Mining Co.*, 26 Utah, 174; 72 Pac. Rep. 688. If the owner permits the engine valve to get so out of repair that it will omit steam and start the engine automatically, he is liable for the death of a miner, caused thereby, although he had complied with the Illinois cage statute in providing the kind of appliances required. *Consolidated Coal Co. v. Maehl*, 81 Ill. App. 252.

³ A failure to repair a hoisting apparatus will not render a master liable to an employee, whose injury is due to the neglect of the holsterman, in not stopping the holster. *Trewatha v. Buchanan Gold Min. Co.* (Cal.), 28 Pac. Rep. 571.

used to lower the men into the mine. It has been held, therefore, that if the mine owner lowers workmen into the mine, without first having ascertained whether or not the mine is free from obstructions, this is such an act of negligence as to render him liable, in case of injury to the men so lowered.¹

§ 421. **Breaking of hoister rope.** — For an injury from the breaking of a hoister rope, where the rope is being used for an ordinary purpose, it has been held that the employer is liable to the injured employee, for the danger is one arising from a defect that is not patent or obvious, but is one that the employer should inform himself about and the miner, engaged in another branch of the service, would not be bound to investigate or discover.² What would, or would not, be considered ordinary use, so as to hold the employer liable for an injury from the breaking of a hoister rope, would necessarily depend upon the character of the mining operations, the customary use such rope is put to and the use at the time of the injury complained of. Lowering coal, for the engines, in a stone

¹ *Alaska United Gold Min. Co. v. Keating*, 116 Fed. Rep. 561: "Where, long prior to an injury to a miner who was struck by a descending cage in a shaft, the owner of the mine had complied with 4 Starr & C. Ann. St. 1902, p. 845, c. 98, § 2b, requiring a passageway to be constructed 14 feet wide around the bottom of the shaft, but, by reason of a cave-in, the passage had become blocked and obstructed so that a man could get through the passageway only by crawling over the rock and debris, and then by squeezing through a narrow passage, which condition existed for about six weeks before the injury, whereas the passage might have been cleared in two or three days' time, it was no defense to an action for injuries under the statute that the mine was in the early stages of development as to which the statute ought not to apply." *Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co. of New York*, 130 Fed. Rep. 937.

² *Clear Creek Stone Co. v. Dearmin*, 66 N. E. Rep. 609; *Kennedy v. Alden Coal Co.*, 200 Pa. St. 1; 49 Atl. Rep. 341.

quarry, is an ordinary use of such a rope¹ and hoisting men or mineral from the mine would be the attainment of the very object for which such rope was provided.² But if the miner is guilty of contributory negligence, which causes the breaking of such rope,³ or if he uses the rope when he ought to have used another appliance, provided by the employer and furnishing a safer mode of going up or down the shaft, as where the rope is used, when a ladder was provided and it was shown to be a safer appliance, for the purpose, then a miner injured from a breaking of a hoister rope, could not recover from his employer.⁴

§ 422. **Same — When miner assumes risk of.** — Where the breaking of a hoister rope is due to the negligence of the employer and the defect in the rope was not open to observation, if the injured miner was without blame, and the breaking of such rope was the approximate cause of his injury, the mine owner would be liable to the injured miner.⁵ But where the defective condition of the rope is

¹ "The complaint averred that the rope gave way while a load of coal for the engines was being lowered. *Held*, that it was sufficiently shown that the derrick was being used for an ordinary purpose." *Clear Creek Stone Co. v. Dearmin*, 66 N. E. Rep. 609.

² See, for case arising from the breaking of a hoister rope, in a mine, *Kennedy v. Alden Coal Co.*, 200 Pa. St. 1; 49 Atl. Rep. 841.

³ *Gribben v. Yellow Aster Min. & Mill. Co.* (Cal. 1904), 75 Pac. Rep. 889. But see *Beresford v. American Coal Co.* (Iowa, 1904), 98 N. W. Rep. 902.

⁴ *Anderson v. Mikado Min. Co.*, 3 Ont. Law Rep. 581. "In an action by an employee against his employer for personal injuries received as the result of the breaking of a rope in which plaintiff was descending, with his foot in a loop thereof, to the bottom of a mine shaft, where it appears that ladders were furnished for the purpose of descending, and were near, and there was no reason why plaintiff should not have used them, his injuries are the result of his own negligence." *Gribben v. Yellow Aster Min. & Mill. Co.* (Cal. 1904), 75 Pac. Rep. 889.

⁵ "Where the breaking of an insufficient rope holding a wheel in place, caused the wheel to revolve, which caused a scaffold on which a servant was working to fall, the breaking of the rope was the proximate

open and obvious, as where it is raveled and torn,¹ or where the plaintiff is familiar with the defects and danger, and with such knowledge, continues to use such rope, without objection, he cannot recover, in case of injury by the breaking of the rope.² In England, it is held, that if a miner is injured as a result of a failure, on his part, to examine or test the rope used to hoist and lower the miners into the mine, as provided by a rule of the employer, and the subsequent breaking of the rope, if it had been properly tested by him, could have been foreseen, he cannot recover for such injury from the breaking of the rope, as his own negligence, in the violation of the rule, made for his own protection, occasioned, or contributed to his injury.³

§ 423. Negligence of fellow-servant operating hoister.
A hoister-man, or "cager" and a miner, at work in the

cause of the fall and a consequent injury to the servant, although, if the pitmans had been detached from the wheel, the rope would not have broken." *Herbert v. Wiggins Co.*, 80 S. W. Rep. 978.

¹ "An instruction that, even if the jury believe that the rope used by the plaintiff at the time of his injury was raveled, yet if they further believe that such condition was apparent to the observation of the plaintiff, and that before the happening of the injury he had a reasonable opportunity to observe the same, and the danger, if any, caused thereby, and that plaintiff was not misled or deceived as to such danger, if any, by the defendant, or by any one acting for the defendant, then the plaintiff cannot recover for any injury that may have been occasioned merely by the rope being in such raveled condition, is erroneous, because it omits the element of plaintiff's knowledge and appreciation of the danger." *Illinois Steel Co. v. Wierzbicky*, 107 Ill. App. 60.

² "In an action for injuries to a servant by the breaking of a rope, an instruction that if plaintiff protested against the sufficiency of the rope, and defendant's agent assured him that the rope was sufficient for the purpose intended, and plaintiff relied on such assurance, and under the evidence an ordinarily prudent person would have relied thereon, and used the rope as plaintiff did, then plaintiff was not guilty of negligence in so doing, was erroneous, in eliminating plaintiff's knowledge, actual or constructive, of both the defects and the danger." *Ft. Worth Ironworks v. Stokes*, 76 S. W. Rep. 281.

³ *Senior v. Ward*, 1 El. & El. 385 (Q. B. 1859); 10 Mor. Min. Rep. 646.

mine, are very generally, held to be fellow-servants and for an injury to the miner from the negligent management of the hoister, or cage, by his fellow-servant, the miner would be without remedy, against the mine employer.¹ Where an injury to a miner, however, is due to the failure to repair the hoisting apparatus, on the part of the employer, combined with the negligence of a fellow-servant, since the combined negligence of the master and a fellow-servant, does not relieve the master, he would be liable for an injury so resulting.² Where a miner was injured by a falling tub, filled with water, striking him while he was at work at the bottom of the mine and it appeared that the hoisting tackle was defective, not being fitted with a safe hook, and that the "jiddy" should have been used for hoisting the water, as it was used for hoisting rock and earth, but the plaintiff had himself attached the tub to the hook, the failure of the hoister-man to use the "jiddy" was held to be the negligence of a fellow-servant, for

¹ See Chapter *Fellow-servants in Mines*. *Coal Creek Mining Co. v. Davis*, 90 Tenn. 711; 18 S. W. Rep. 887; *Niantic Coal Co. v. Leonard*, 126 Ill. 216; 19 N. E. Rep. 294; *Stearn v. Schlotterl*, 21 Ill. App. 97; *Roe v. Thompson* (Texas), 61 S. W. Rep. 528; *Erickson v. Victor Copper Co. (Mich.)*, 90 N. W. Rep. 291; *Jackson v. Lincoln Mining Co. (Mo. App.)*, 80 S. W. Rep. 727; *Galvin v. Pierce (Pa.)*, 54 Atl. Rep. 1014; *Chapman v. Reynolds*, 77 Fed. Rep. 274; *Buckley v. Gould Co.*, 14 Fed. Rep. 838. The injury to a miner from a reversal of hoisting machinery, by a fellow-servant, is the negligence of such fellow-servant and not the employer's failure to supply a brake on the hoister. *Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700; 74 Pac. Rep. 307.

² *Keost v. Santa Ysabel Gold Min. Co.*, 68 Pac. Rep. 771; *Jenkins v. Mammoth Min. Co.*, 68 Pac. Rep. 845; *Loveless v. Standard Gold Min. Co.*, 42 S. E. Rep. 741; *Young v. Iron Co.*, 103 Mo. 324; 15 S. W. Rep. 771; *Noble v. Bessemer Co.*, 127 Mich. 103; 54 L. R. A. 456; 86 N. W. Rep. 520; *Logo v. Walsh*, 98 Wis. 384; 74 N. W. Rep. 212; *Deweese v. Meramec Iron Co. (Mo.)*, 31 S. W. Rep. 110; *Hayne v. Furnace Co.*, 67 Mo. App. 491, and for other cases, see Chapter, *Fellow-servants in Mines*.

whose negligence the plaintiff was without remedy against the employer.¹

§ 424 **Same — Negligence of superintendent or foreman.**— A miner is not held to assume the negligence of his foreman or superintendent, operating the hoister or cage, however, in those jurisdictions where the foreman or superintendent is held to be a vice-principal of the miner, employed in the ground.² But in those States where the dual capacity doctrine is adhered to and the master is held liable for the act of a vice-principal, only when giving orders, or acting within the line of his duty, as such vice-principal, and not for acts in his capacity as a co-employee, or fellow-servant, the master, upon principle, could not be held liable for the negligence of such an employee, while taking the place of a “cager” or hoisterman.³

§ 425. **Incompetent hoister man or “cager.”**— For an injury traceable to the negligence of a mine employer in employing or retaining in his service a known incompetent

¹ *Griffith v. Gidlow*, 8 Hurlst. & N. 648; 10 Mor. Min. Rep. 689. Proof that an incompetent person was knowingly retained in charge of an engine and hoister, will justify a recovery, under Sec. 7 Illinois statute, preventing a willful disregard of such statute. *Niantic Coal & Min. Co. v. Leonard*, 126 Ill. 216; 19 N. E. Rep. 294; *Consolidated Coal Co. v. Maehl*, 130 Ill. 551; 22 N. E. Rep. 715.

² *Alaska United Gold Min. Co. v. Muset*, 114 Fed. Rep. 66; see, also, *Downey v. Illinois Min. Co.*, 24 Utah, 481; 68 Pac. Rep. 414. “A mine employee did not assume the risk of being thrown from a cage by which the employes were lifted to the surface, through the negligence of a superintendent, who, though he knew he was not a competent engineer, attempted to operate the cage in the absence of the regular engineer.” *Beresford v. American Coal Co.* (Iowa, 1904), 98 N. W. Rep. 902. A “pit boss,” whose duty it is to see that a hoister is used as provided by the statute, cannot recover for a failure to comply with the statute, in Illinois. *Beaucamp Coal Co. v. Cooper*, 12 Ill. App. 373.

³ See chapter *Fellow-servants in Mines*, Sections 295, 296, and cases there cited.

hoister man, or "cager," the employer would be liable the same as for an injury from negligence in a failure to repair or furnish reasonably safe appliances, as the duty to employ reasonably competent and fit employees is the same upon the part of the employer as that respecting the use of reasonably safe machinery or appliances.¹ As the responsibility of the mine owner, for injuries from the incompetency of fellow-servants, depends upon his knowledge of such incompetency or his ability to know thereof² and since the burden of proving such incompetency and knowledge, or ability to know, is on the plaintiff,³ prior acts of unfitness, upon the part of the servant causing the injury, are competent to put in evidence as going to establish the employer's means of knowledge.⁴ But it would usually require more than one act of incompetency or unfitness, on the part of an employee, to charge his employer, as a matter of law, with notice of his incompetency, sufficient to hold him liable, on this ground, for an injury from the retention of such unfit or incompetent employee in his service, and proof that on one prior occasion a hoister-man was guilty of a remissness of his duty as such, will not be sufficient to render the employer liable for retaining him in his employment as an incompetent man for the purpose for which he was employed.⁵

§ 426. **Independent contractor operating.**— For an injury to an employee in a mine, from the negligence of an independent contractor, in charge of the hoisting appliance,

¹ Bailey Mas. Liab. Inj. Serv., pp. 87, 57. A mine owner retaining a reckless hoisterman is liable if he had had time to discover his incompetency. *Princeton C. & M. Co. v. Roll (Ind.)*, 66 N. E. Rep. 169; *Wickland v. Coal Co. (Iowa)*, 73 N. W. Rep. 805.

² Bailey's Mas. Liab. Inj. Serv., pp. 49, 50.

³ *Michigan Cent. Co. v. Gilbert*, 46 Mich. 179; 9 N. W. Rep. 248.

⁴ *Kean v. Detroit Copper & C. Mills*, 66 Mich. 284; 83 N. W. Rep. 395.

⁵ "An employer would not be chargeable with knowledge of the incompetency of a hoisting engineer, simply because on one previous occasion he had made a "mishoist." *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270; 28 Atl. Rep. 1087. "In an action by a miner for injuries re-

where the mine owner reserves no control or supervision over the appliances or the method of the operations, the mine owner would not be liable for such injury.¹ It has, accordingly, been held, in Michigan, that a miner could not recover from his employer, for an injury from the breaking of a hoister rope, where the shaft and the appliances used in connection therewith, were, at the time of the injury, under the control, exclusively, of an independent contractor.² But if a mine owner employs an independent contractor to open his mine and reserves to himself a supervision or control over the hoisting apparatus, he will be liable for an injury resulting from a defective condition of such appliance³ and the same result would follow whenever he provided the appliance⁴ or employed a known incompetent or negligent contractor.⁵

ceived in an accident to the cage in which he was descending, the evidence failed to show how much inquiry was made by defendant, his employer, before hiring the engineer in charge. On one other occasion while such engineer was in charge the cage descended with great force but for what reason was not shown, further than that the superintendent warned him, in the light of such experience, not to run the cage too rapidly. *Held* insufficient to charge the employer with negligence in employing an incompetent engineer." *Wicklund v. Saylor Coal Co.* (Iowa, 1908), 93 N. W. Rep. 805.

¹ *Lendberg v. Brotherton Iron Min. Co.*, 75 Mich. 84; 42 N. W. Rep. 675; *Boswell v. Laird*, 8 Cal. 469; 10 Mor. Min. Rep. 616; *Fink v. Furnace Co.*, 13 Mo. App. 61; 82 Mo. 276; *Roddy v. Missouri Pacific Co.*, 104 Mo. 234; *Ziebell v. Eclipse Co.* (Wash.), 15 Amer. Neg. Rep. 457; *Painter v. Pittsburg*, 10 Wright, 213; *Harrison v. Hiser*, 79 Ga. 588; *Miller v. Min. & C. Co.*, 76 Iowa, 655; *Gas Co. v. Waters*, 123 Pa. St. 220. One who contracts for the sinking of a shaft on his property, agreeing to furnish the necessary tools, including a "holst," while the other party is to furnish the labor, is held, in *Central Coal & I. Co. v. Grider* (Ky.), 65 L. R. A. 455, not to be liable for an injury to an employee through the breaking of a rope used on the holst, which is sufficient when furnished, but is allowed by the contractor to become defective. The above decision is squarely in conflict with that of *Fell v. Rich Hill Coal Min. Co.* (23 Mo. App. 216), by Judge Phillipps.

² *Lendberg v. Brotherton Iron Min. Co.*, 75 Mich. 84; 42 N. W. Rep. 675.

³ *Fell v. Rich Hill Coal Mining Co.*, 23 Mo. App. 216.

⁴ *Burns v. McDonald*, 57 Mo. App. 599.

⁵ *Brannock v. Ellsmore*, 114 Mo. 55. See *White Mines & Min. Rem.*, S. C. 894, p. 528.

CHAPTER XX.

INSUFFICIENT NUMBER AND INCOMPETENT EMPLOYEES.

SECTION 427. Scope of chapter.

- 428. The duty a continuous one.
- 429. Same — No personal supervision required.
- 430. Actual or constructive knowledge essential.
- 431. Same — How established.
- 432. Certificate of examining board not conclusive.
- 433. Employment of infant not necessarily negligence.
- 434. Insufficient number of employees.
- 435. Reckless employee placed with inexperienced miner.
- 436. Vigilance increases with hazards of service.
- 437. Same — Employee handling dangerous explosives.
- 438. Employment of intoxicated servants.
- 439. When risk of assumed.

§ 427. Scope of chapter. — The general law governing actions for personal injuries based upon the negligence of the employer in retaining incompetent or reckless servants in his service is treated of in most works upon master and servant and the rules of evidence and practice and the liability and non-liability, of the employer, for the acts of alleged incompetent or reckless employees, is practically the same in all vocations, but as the rights of employer and employee in quite a number of mining cases, have been considered by the courts, upon this allegation of negligence, while the rule that obtains in this class of cases, is not essentially different from that in any other vocation, where the same relations exist, it is not deemed out of place to present a few of the decisions in mining cases, upon this duty of the employer, as such decisions are not especially grouped in any text-book or digest, but must be found, by the practitioner, among the mass of other similar case law upon the subject.

§ 428. **The duty a continuous one.** — The employer's duty, as regards the hiring or retention in his service, of unfit or reckless employees, is a continuing duty and he will be liable for an injury to an employee, as a result of the incompetency of another servant, whether the unfitness of the servant causing the injury was known by the employer when he was employed, or he was continued in his service after he acquired such knowledge.¹

§ 429. **Same — No personal supervision required.** — But while the master's duty is to discharge or refuse to employ an incompetent servant, whenever he has knowledge of such incompetency, before he will be liable, in case of an injury, upon this ground, he must have knowledge, either actual or constructive, of the incompetency of such employee.² He is not required to exert a personal supervision over his employees, after employing competent servants, to see that they remain competent, for the obvious reason that until old age would change the rule, experience would add to, rather than detract from the competency of an employee in a given service.³

§ 430. **Actual or constructive knowledge essential.** — The employer is not required to test or examine his different employees, as he would inspect his appliances to ascer-

¹ *Rummell v. Dillworth*, 111 Pa. St. 349; 2 Atl. Rep. 355; *Morse v. Glendon Co.*, 125 Mass. 282; *Colton v. Richards*, 123 Mass. 484; *Bailey Mas. Liab. Inj. Serv.*, p. 47. For a case of an injury from retention of incompetent servant see *Hall v. New Bedford Quarries Co.*, 156 Ind. 460; 60 N. E. Rep. 149. "When the character of the business requires it, the master is as much bound to provide his workmen with a reasonably competent foreman as to provide them with tools; but his liability ceases when he has made a suitable selection." *O'Dowd v. Burnham* (Pa. Super. Ct. 1902), 19 Pa. Super. Ct. 464.

² *Potts v. Post Carlisle Co.*, 8 W. R. 524; *Davis v. Detroit Mill Co.*, 20 Mich. 105.

³ *Buswell Per. Inj.*, Sec. 200, p. 331 and cases cited.

tain if they are competent for the service for which they are engaged, as every person in legal contemplation, is presumed to do his duty¹ and the employer has a right to rely upon this presumption, in regard to the fitness or competency of his employees, in the absence of notice of their incompetency,² and before he could be held liable to an injured employee, upon this ground of negligence, he must either have actual knowledge of such incompetency, or it must have continued for a sufficient length of time to charge him, in law, with such knowledge.³ Actual notice is so far essential, to hold an employer responsible for the negligent acts of an alleged incompetent employee, that it has been held, in Michigan, that without such notice, any number of previous negligent acts, on the part of such employee, would be improper evidence, unless such negligent acts were of a character to charge the employer with notice of the incompetency of the servant guilty thereof.⁴

§ 431. **Same—How established.**—It has been held competent for the plaintiff to put in evidence previous acts of incompetency upon the part of the servant causing his injury, and then to bring notice of such acts to his em-

¹ *Michigan Cent. Co. v. Gilbert*, 46 Mich. 176; 9 N. W. Rep. 243; *Bailey Mas. Liab. Inj. Serv.*, p. 55.

² *Michigan Cent. Co. v. Gilbert*, *supra*; *Larrant v. Webb*, 18 C. B. N. S. 797.

³ *Bailey Mas. Liab. Inj. Serv.*, pp. 48, 50. Where an engineer has been in the employ of a mine owner twelve years and always found sober and competent, the mere fact that on a prior occasion he failed to reverse the lever of his engine, will not be evidence of such incompetency so as to charge the employer with notice thereof. *McKeever v. Homestake Min. Co.*, 10 S. D. 599; 74 N. W. Rep. 1058.

⁴ "A master must have notice of the incompetency of a fellow-servant before he is liable for an injury from his negligence. Without notice of the fact, any number of acts of negligence, on his part are incompetent, unless of a character to charge the master with notice thereof." *WALKOSKEE v. PENOKEE CON. MINES*, 115 Mich. 629; 73 N. W. Rep. 895; 41 L. R. A. 88.

ployer, for the purpose of proving his knowledge of the unfitness of the delinquent employee,¹ but one or two previous negligent acts, if the employment has covered a considerable period, would not, usually, be evidence of a series of incompetent acts sufficient to charge the employer, in law, with knowledge of such servant's incompetency, for, in truth, such proof would not establish the unfitness of the employee, much less another's notice thereof.² It was, accordingly, held in South Dakota, that where an engineer had been in the service of a mine owner for twelve years and had always proven himself a sober, competent employee, the mere fact that on one prior occasion he had forgotten to reverse the lever of his engine, would not, of itself, be such evidence of his incompetency, as to charge his employer with notice of his unfitness.³ But where an employee had been addicted to drunkenness for a length of time sufficient for his employer, in the exercise of due care, to have discovered such weakness, the retention of such drunken employee in his service, in a business as hazardous as mining, would be evidence sufficient to render the employer liable in case of an injury from such servant's incompetency.⁴ And if the alleged unfit employee was so

¹ *Evansville & G. H. Co. v. Guyton*, 115 Ind. 450; 17 N. E. Rep. 101. "The mere fact of the incompetency of the servant for the work upon which he was employed is not enough to warrant a jury in finding the master guilty of negligence in employing him." *Big Stone Gap Iron Co. v. Ketron* (Va. 1903), 45 S. E. Rep. 740.

² *McKeever v. Homestake Mining Co.*, 10 S. D. 599; 74 N. W. Rep. 1053; *Couch v. Coal Co.*, 46 Iowa, 17. "Where it appears in an action for the death of an employee that the person whose negligent operation of machinery is alleged to have caused the accident had been employed at similar work for many years, and had performed their duties carefully, and without previous accident, negligence by defendant in the employment of such persons to work with deceased is not shown." *Grams v. C. Reiss Coal Co.* (Wis. 1905), 102 N. W. Rep. 586.

³ *McKeever v. Homestake Mining Co.*, 10 S. D. 599; 74 N. W. Rep. 1053; *Couch v. Coal Co.*, 46 Iowa, 17.

⁴ *K. & N. v. Detroit Copper Mills*, 66 Mich. 284; 33 N. W. Rep. 395.

inexperienced or youthful as to be incompetent for these hazardous or peculiar duties he is engaged to render, the facts and circumstances, his age or want of experience and the nature of the service he was engaged to render, might, of themselves, be sufficient from which a knowledge of his incompetency would be inferred, on the part of the employer.¹

§ 432. **Certificate of examining board not conclusive.** — It would seem, where a statute required the employees in mines to be subjected to an examination by an examining board, before employment by a mine operator, that the employer would perform his full duty, in the employment of an employee who had successfully withstood a satisfactory examination, as this would be some evidence of his competency and his employment must have been with knowledge of his incompetency, before the employer would be liable therefor, in case of a resulting injury to an employee. But in Illinois, although the statute requires such an examination of miners, a certificate by an employee from a duly qualified board is held not to be conclusive, as to the question of his competency, at the time of his employment, in a controversy between the master and another employee.²

§ 433. **Employment of infant not necessarily negligence.** — While the master would be negligent if he employed a known incompetent servant to handle an important

¹ *Wabash Co. v. McDaniels*, 107 U. S. 454; 2 Sup. Ct. Rep. 932.

² *Consolidated Coal Co. v. Seniger*, 179 Ill. 370; affirming 79 Ill. App. 466; 53 N. E. Rep. 738. A retention of such an employee in the service after knowledge of the unjustness of his certificate, ought to avoid the effect thereof, but it would seem that a certificate as to the competency of the employee, certified to by a public board, appointed to perform such duty, ought to be evidence of his competency as of the date when the certificate was granted.

and dangerous branch of his business, whether the incompetency resulted from the lack of ability, drunkenness or infancy of the employee, so engaged, he would not be considered guilty of negligence by the mere fact of engaging the services of an infant, provided he was competent to discharge the duties he was engaged to discharge. Accordingly, in a Michigan case, the fact that the employee engaged to handle the brake, where the cage in which the workmen were lowered and raised from the mine was regulated, was but seventeen years old, was held not to raise a presumption of negligence against the company, although he permitted the cage to fall, to the injury of an occupant, where the employee was experienced in the work and for over seven months had performed the same duties satisfactorily.¹

§ 434. **Insufficient number of employees.** — The same rule, based upon the concern the law has, for the safety of the employee, which requires the employment of fit employees for the service and proper appliances for the work, would require the master to engage a sufficient number of employees to carry on the work, with reasonable safety.² Of course what would be considered an adequate number of employees would necessarily vary with the nature of the service performed and the character and extent of the business.³ As in the proof of any other allegation of negligence, the burden of establishing that the employer had failed to engage an adequate number of employees and

¹ *Walkowski v. Penokee & G. Consolidated Mines*, 115 Mich. 629; 41 L. R. A. 83; 73 N. W. Rep. 895. See, also, *Sutherland v. Troy & Co.*, 125 N. Y. 787; *Kansas & Texas Coal Co. v. Brownlie*, 60 Ark. 582; *Neal v. Gillett*, 28 Conn. 437; *Molaske v. Ohio Coal Co.*, 86 Wis. 220.

² *Georgia Pacific Co. v. Propst*, 7 So. Rep. 635; *Booth v. Boston & A. R. Co.*, 73 N. Y. 88; *Mad River Co. v. Borger*, 5 Ohio St. 541; *Balley Mas. Liab. Inj. Serv.*, pp 68, 69; *Buswell, Per. Inj.*, Sec. 200, p. 332.

³ *Ante, idem.*

that the injury to the plaintiff arose from such cause, would be upon the plaintiff in the case.¹ The plaintiff would be required both to allege and prove the reason for the necessity of a greater number of employees, and a petition which failed to allege such facts would be defective.²

§ 435. **Reckless employee placed with inexperienced miner.** — An employee who might not be considered so incompetent as to render his employer liable, in case of an injury to another employee of average skill and experience, might as to any injury resulting to a young, or inexperienced miner, have such a reputation as to render his employer liable for having placed such youthful or inexperienced employee at work with him, as the employer owes the duty to an inexperienced employee, engaged in a hazardous business, not only to select proper and fit appliances for their use, but to put them in no department of the service where they will be exposed to unusual dangers with which they are not familiar.³ In a recent case, in Missouri, where an inexperienced employee was ordered to clean out the hot ashes from the employer's reduction works and a reckless assistant permitted him to turn water from a hose upon the ashes, as a result of which he was scalded by the

¹ *Brothers v. Carter*, 52 Mo. 372; *Davis v. Detroit &c. Co.*, 20 Mich. 105; *Allen v. Gas Co.*, 1 Ex. D. 251; 45 L. J. Ex. 668; *Buswell Per. Inj.*, Sec. 199, p. 330.

² "Where the negligence counted on is the failure to provide the plaintiff a helper, the petition is defective if it does not specify the reasons for the necessity for a helper." *Lee v. Kansas City Gas Co.*, 91 Mo. App. 612.

³ *Tagg v. McGeorge*, 156 Pa. St. 368; 26 Atl. Rep. 671; *McGinnis v. Canada B. Co.*, 49 Mich. 466; 18 N. W. Rep. 819; *Runnell v. Delaware*, 131 Pa. St. 509; 19 Atl. Rep. 345; *Kehler v. Schmeuck*, 151 Pa. St. 519; 25 Atl. Rep. 130; *Rolling Mill Co. v. Corrigan*, 46 Ohio State, 283; 20 N. E. Rep. 466; *Pratt v. Pronty*, 153 Mass. 384; 26 N. E. Rep. 1002; *Bailey Mass. Liab. Inj. Serv.*, pp. 114, 116.

steam, the employer was held liable for his injury.¹ And likewise, in Utah, where an inexperienced miner was injured as a result of having been placed at work with a reckless employee, it was held competent to prove a custom in the section, to place a careful, skillful miner at work with one of little or no experience, in such hazardous undertaking.²

§ 436. **Vigilance increases with hazards of service.** — The master's duty as regards the supervision of his employees necessarily varies with the nature of the service they are employed to render and an employee who would be considered thoroughly competent to perform the simpler duties of the business, upon the surface of the ground, if he had no experience in the underground work in the mine, could not be regarded as a proper or fit person to place in charge of men in the mine, or to carry on or assist in departments of the business wherein he had had little or no

¹ In *Hunt v. Desloge Consol. Lead Co.* (Ct. of App. Mo. 1904), 79 S. W. Rep. 710, "Plaintiff's interstate was ordered to clean out the ash pits of defendant's reduction works. The ashes were very hot, and the usual method was to turn water into the pits and cool them down and then shovel out the ashes with a long-handled shovel. In this case the employee was ordered in first, then the hose handed to him, and he was badly scalded and burned. He was a green man, as the foreman knew. A judgment for plaintiff was affirmed. The defendant company had given orders that none of its employees should be required to work in a place of danger, but the men selected to carry out its orders were incompetent or reckless." 16 Amer. Neg. Rep. 155.

² "In an action against a mining company for injuries to an inexperienced miner, claimed to be due to a failure to instruct him how to perform his services, evidence as to what the usual custom was that prevailed in the mines in Utah and at defendant's mine in respect to having an experienced miner work with one whom the employer knows to be inexperienced was admitted to show what precautions were generally taken in such cases, as bearing on the degree of care which defendant exercised for plaintiff's safety. *Held*, that the evidence was admissible for this purpose, without showing that the custom had been in existence long enough to constitute it a common-law custom." *Pence v. California Min. Co.* (Utah 1904), 77 Pac. Rep. 934.

experience.¹ The master does not warrant the fitness of his servants,² but as in the selection of an appliance, intended for a dangerous use, more care should be bestowed upon such implements, than in the selection of a tool for the simpler uses of the business, so an employee, engaged for the more hazardous duties, should be more carefully selected.³ An employee, however, unlike an appliance, would necessarily improve with service, and hence, the employer is not bound to exert a personal supervision over his employees to prevent carelessness as he would with his appliances, for needed repairs.⁴

§ 437. **Same — Employee handling dangerous explosives.** — The rule stated in the preceding section is well illustrated in a recent Pennsylvania case, with reference to the handling of giant powder, used for blasting purposes in a mine. The deceased was a son of the plaintiffs and when killed, was a laborer in the defendant's mine. The cause of the casualty, which resulted in the death of plaintiffs' son, was a powder explosion, of which the deceased had not been warned. The man employed by the mine owner to warn the miners of expected blasts had the reputation of being careless, when employed, and frequent complaints of his unfitness had been made to the defendants superintendent, by other miners in its service. Upon this evidence of the employee's carelessness in the handling

¹ "The greater the danger, the greater the care, is the rule." *Bailey Mas. Liab. Inj. Serv.*, p. 55, citing *Hills v. R. R. Co.*, 55 Mich. 440; 21 N. W. Rep. 878. See, also, *Senlor v. Ward*, 28 L. J. Q. B. 139. For liability in employing an incompetent mine surgeon, see, *Richardson v. Carbon Hill Coal Co.* (Wash.), 32 Pac. Rep. 1012; 20 L. R. A. 388.

² *Beaulieu v. Portland Co.*, 46 Maine, 291; *Ormond v. Holland*, El. Bl. & El. 102; *Buswell Per. Inj.*, Sec. 198, p. 327.

³ *Northern Pacific Co. v. Mares*, 128 U. S. 710.

⁴ *Hord v. Vermont Con. Co.*, 32 Vt. 473; *Buswell Per. Inj.*, Sec. 200, p. 331.

of such a dangerous substance as giant powder, the trial court held the defendant liable for his retention in its employment and the judgment was affirmed.¹

§ 438. Employment of intoxicated employees. — The habitual use of intoxicating liquor is judicially recognized as exerting such a pernicious influence upon those subject to its use as to render them unfit for the performance of any duties accompanied with any degree of skill or danger and all men are so charged, in law, with a knowledge of the incompetency of men addicted to the habitual use of intoxicants, that an employer is held liable for an injury to an employee, resulting from the negligence of a known habitual user of intoxicants, engaged in the master's service.² The business of mining in all of its details, is so hazardous that only men of experience and sobriety should be employed. A drunken man handling such dangerous agencies as giant powder while practically unaccountable for his acts, might, in a moment's inadvertence, take the life or maim the bodies of many of his co-employees. An employee in a mine rendered unaccountable by the use of intoxicants, could by the merest casualty bury alive the occupants of the mine by the displacement of a single prop or timber. Such hazardous trades, therefore, have no room for those unfortu-

¹ "In an action by parents against a mining company for the death of their son, resulting from alleged negligence in blasting, a verdict for plaintiffs will be affirmed, where it appears that the man whom defendant employed to direct the blasting and to notify employees of the blasts did not notify the deceased, that this person came to the defendant with the reputation of being careless and reckless in blasting, and that frequent complaints of his carelessness had been made by other employees to the general superintendent of the defendant." *Stasch v. Cornwall Ore Bank Co.* (Pa. Super. Ct. 1902), 19 Pa. Super. Ct. 118.

² "The habit of intoxication * * * renders otherwise competent servants incompetent. * * * It counteracts skill. It transforms prudence and caution into rashness and recklessness." *Bailey's Mas. Liab. Inj. Serv.*, p. 59.

nates addicted to a weakness likely to cause such suffering to innocent third parties, and an employer who has so little care for his employees' safety as to retain in his service an employee addicted to the use of intoxicants is guilty of such disregard of his duty as to render him liable in case of an injury from the employment of an intoxicated servant the same as though he had employed a tool or appliance wholly unfit for the service.¹

§ 439. **When risk of assumed.** — Where the evidence of an employee alleged to have been injured by the incompetency of a fellow-servant, develops that he was, prior to such injury, informed of the unfitness of such employee for the service he was engaged in at the time of the injury, and that he had continued in the service thereafter without objection to the master, he would be held to have assumed the risk of such injury and could not recover from his employer.²

¹ *Kean v. Detroit Copper Mills*, 66 Mich. 284; 33 N. W. Rep. 395.

² *Holt v. Nay*, 144 Mass. 186; 10 N. E. Rep. 807; *Assop v. Yates*, 2 Hurl. & N. 768; *Kansas Pac. Co. v. Peavey*, 84 Kan. 472; 8 Pac. Rep. 780.

CHAPTER XXI.

RULES GOVERNING CONDUCT OF MINERS.

SECTION 440. When mine owner should establish.

- 441. Act of co-employee must cause injury under.
- 442. Reasonableness and sufficiency of rule.
- 443. Usage and custom as effecting.
- 444. Employees must have notice of.
- 445. Rule must be enforced.
- 446. Must be definite and certain.
- 447. Rules for signaling must be provided.
- 448. No rule required for handling ore cars.
- 449. Handling ore in bins does not require.
- 450. Drilling for powder does not require.
- 451. When violation of, contributory negligence.
- 452. Same — Violating rule requiring props.
- 453. Same — Rule requiring report of dangerous places.
- 454. Same — Rule regarding hoisting of miners.
- 455. Rule need not be pleaded.

§ 440. When mine owner should establish. — It is the duty of a mine owner, when the nature and volume of his business requires it, to make and promulgate proper rules for the protection of his servants and to use due care and diligence, after making and promulgating a necessary rule, to have it enforced.¹ The duty arises whenever the business is so complex or extensive as to make the employer's personal supervision and direction of it impracticable.² The necessity for rules is particularly necessary, whenever the business, as usually conducted, is such that the safety of a given employee depends upon the conduct of some other employee, in the discharge of his duty toward his em-

¹ Johnson v. Union Pacific Coal Co., 76 Pac. Rep. 1089; Reagen v. St. L. M. N. & W. Co., 93 Mo. 348; 6 S. W. Rep. 371; Smith v. Oxford Iron Co., 42 N. J. Law, 467.

² Giordano v. Brandywine Granite Co., 52 Atl. Rep. 332.

ployer. In every case where an employee's safety depends upon the action of some other employee, the servant whose safety is so dependent is entitled to have the conduct of his co-employee regulated by an approved rule, established by his employer,¹ and a failure to establish rules, in such a case, is held to be personal negligence, by the mine owner, for the consequences of which he is liable to his servants.² But a master will not be considered guilty of negligence in failing to establish rules, if there was no reason for him to anticipate the necessity for such a rule, and it is only where common ordinary prudence would dictate the necessity for rules that he would be held guilty of negligence in not providing them,³ and where he had, for years, conducted his business along given lines, without rules, with no serious consequences, he would not be held negligent in failing to establish rules.⁴

¹ *Eastwood v. Retsof Mining Co.*, 86 Hun, 91; 34 N. Y. Supp. 196.

² *Richlands Iron Co. v. Elkins*, 90 Va. 249; 17 S. E. Rep., 890; *Wood Mas & Serv.*, Sec. 403; *Shearm. & Redf. Neg.*, Sec. 93. "It is the duty of the master, when the nature of the business requires it, to make and promulgate rules for the protection of his servants, and to use due care and diligence after making and promulgating a necessary rule, to have it enforced." *Johnson v. Union Pac. Coal Co. (Utah)*, 76 Pac. Rep. 1089.

³ "A master is not negligent for failing to promulgate a particular rule, unless he should have foreseen and anticipated the necessity for the rule, and that it was a practicable and beneficial rule." *Koszlowski v. American Locomotive Co. (N. Y. Supp. 1904)*, 89 N. Y. Sup. 55.

⁴ "Where an employer's business has been, for years, conducted without rules, it is not negligence to fail to promulgate rules." *Morgen v. Hudson River Ore Co.*, 133 N. Y. 666, 31 N. E. Rep. 234. "It is the duty of the master to make and promulgate proper rules for the government of his servants and business whenever it is so large or complicated as to make his personal supervision impracticable." *Giordano v. Brandywine Granite Co. (Del. 1901)*, 52 Atl. Rep. 332. "Mere failure of a master to adopt rules to prevent injury to a servant is not proof of negligence, unless it appears that the master, in the exercise of reasonable care, should have foreseen the necessity for such precaution." *Shaw v. New Year Gold Mines Co.*, 77 Pac. Rep. 515.

§ 441. **Act of co-employee must cause injury.** — As a general proposition the necessity for a rule, in a given case, is only material as affecting the employer's liability, where the injury was due to the act of a fellow-servant, whose conduct should have been regulated by a rule, to insure the protection of his co-employees. Unless the injury complained of, therefore, resulted from the act of a fellow-servant of the injured employee, a failure to adopt a rule, will not, generally, render the employer liable for such injury.¹

§ 442. **Reasonableness and sufficiency of rule.** — The question of whether or not a given rule is reasonable or unreasonable is said in some States to be one of law for the court;² in others, to be an issue of fact for the jury.³ The better doctrine would seem to be to hold the reasonableness of a rule a question for the court, not only because the evidence in regard to the terms and conditions of the rule, would, necessarily, be undisputed and where this is true, the effect of the undisputed evidence is generally a question for the court,⁴ but also to the end of securing certainty and uniformity in the construction of similar rules, as courts, in the adherence to precedents, would be more inclined to consistency than different juries, and the court would, also, as a general rule, be better qualified to interpret the rule than a jury would be.⁵ The presumption of law is in favor of the sufficiency and

¹ A failure to provide rules will not render the employer liable, if the injured employee is not injured by a fellow-servant. *Benfield v. Oil Co.*, 75 Hun, 209; 26 N. Y. Supp. 405.

² *Vedder v. Fellows*, 20 N. Y. 126; *Chicago B. & I. Co. v. McClelland*, 84 Ill. 110.

³ *State v. Overton*, 24 N. J. Law, 435; *Prather v. R. R. Co.*, 80 Ga. 427; 9 S. E. Rep. 530.

⁴ *Old Colony Co. v. Gripp*, 147 Mass. 85; 17 N. E. Rep. 89.

⁵ *Bailey's Mas. Liab. Inj. Serv.*, p. 75.

reasonableness of an employer's rules; ¹ the court would be inclined to the construction which would uphold the rule,² and if, for any considerable period, a given rule has afforded a fair and reasonable protection to the employees,³ or if it protects the employees, as well as reasonably can be done, against the dangers resulting from the negligence or indiscretions of fellow-servants, the rule will generally be held sufficient, by the courts.⁴

§ 443. **Usage and custom, as affecting.** — As the necessity for rules is governed by the test of what a reasonably prudent person under similar circumstances, would do, it is very generally held that where it is not customary, in the district where the injury occurred, for employers in the same kind of business to establish rules upon the subject wherein it is claimed the defendant was negligent in failing to adopt rules, it is proper to permit proof of such custom, as determining the question of the employer's carelessness.⁵ And the evidence of a custom would be competent, not only to establish whether or not a given rule should have been established, but also to determine the question of the sufficiency of such a rule, after it had been promulgated.⁶ And not only may the employer avoid the charge of negligence

¹ Labatt Mas. & Serv., Sec. 210, p. 464.

² Little Rock & Memphis Co. v. Barry, 84 Fed. Rep. 944; 48 L. R. A. 349; 56 U. S. App. 87.

³ Murphy v. Hughes (Ga.), 40 Atl. Rep. 187.

⁴ Abel v. Del. & H. Canal Co., 128 N. Y. 662; 28 N. E. Rep. 668; Evansville & T. H. Co. v. Tokiel, 143 Ind. 60; 42 N. E. Rep. 852.

⁵ Eastwood v. Retsof Mining Co., 86 Hun, 91; 34 N. Y. Supp. 196. "Compliance with the usage of any considerable majority of the class of employers, to which the defendant belongs, is treated as being conclusive in his favor." Labatt Mas. & Serv., Sec. 213, p. 471.

⁶ The custom of a mine employer to require the father of an infant to apply to the bookkeeper for an order on the blacksmith for tools for the son, was not such a custom as could not be waived by the mine employer. Ringue v. Oregon Coal & Nav. Co., 75 Pac. Rep. 708.

as to the necessity for, or sufficiency of a given rule, by proof of a custom, in accordance with his conduct, but he may also prove an habitual practice, on his part, of which the injured servant had knowledge, which was equally as safe a method, if such practice had been adhered to, as that of the alleged rule, for the performance of his work.¹

§ 444. Same — Employees must have notice of. — Before an employer could defeat an action for personal injuries, by the proof of a violated rule, by the employer, he must establish, by competent evidence, that such rule had been brought to the attention or notice of such employee, for unless this is established, the employee could not be said to be guilty of any neglect in failing to follow a rule of which he had no knowledge.²

§ 445. Same — Rule must be enforced. — It was early held, in an English case,³ that a mine employer could not urge, as a breach of duty on the part of his employee, the violation of a rule that the employer had, himself, failed to enforce.⁴ A knowledge, on the part of an employer, that his employee habitually violated his rules, would be the same as though such rules had never been established by him, and so it is quite generally held, by the courts, that it is not only the employers duty to promulgate rules,

¹ *Kudik v. Lehigh Valley Co.*, 72 Hun, 492; 29 N. Y. Supp. 533; *Rutledge v. Missouri Pacific Co.*, 123 Mo. 131; 24 S. W. Rep. 1053; 27 *id.* 327.

² *Olson v. St. Paul M. & M. Co.*, 38 Minn. 117; 35 N. W. Rep. 866; *Daly v. Brown*, 167 N. Y. 381; 60 N. E. Rep. 752.

³ *Senior v. Ward*, 1 El & El, 385; 28 L. J. Q. B. N. S. 139 and see *Silver Cord Con. Min. Co. v. McDonald*, 14 Colo. 191; 23 Pac. Rep. 316.

⁴ Like Strap, in Roderick Random, who laid aside his coat to engage in an unworthy encounter, and lost it, after he was well beaten, an employer who has himself abandoned a rule intended for the protection of his employee, after an injury to the latter, cannot shelter himself behind an authority that he has himself cast aside. *Law and Lawyers*, p. 221.

but that he should also see that such rules are enforced.¹ It is said to be the duty of the employer, especially, to see to the obedience to his rules, on the part of young and inexperienced servants; if he has failed to enforce the rules, until an injury, he is held to have waived the benefit of such rule² and the issue of whether or not a given rule had, or had not been enforced, would be a question of fact, for the jury.³ The correctness of this position, however, has been very ably criticised by an author of great ability,⁴ who aptly suggests that by bringing to the notice of a servant, a rule intended for his benefit, the master has performed his full duty; that after notice of the rule, the servant should himself, in the performance of his duty to look out for his own safety, see to the enforcement of the rule, and if he voluntarily violates the rule, he thereby selects the more dangerous method of performing his duty, in which case the law prevents his recovery.⁵

§ 446. **Must be definite and certain.** — A rule brought to the attention of the employee is said to have the force and effect of a contract between the employer and employee,⁶ and like any other contract, to be effective, the rule must

¹ *Texas & N. O. Co. v. Echols*, 87 Texas, 339; 27 S. W. Rep. 60; *Labatt Mas. and Serv.*, Sec. 214, p. 476 and cases cited.

² *Labatt Mas. & Serv.*, Sec. 214, p. 476.

³ *Avilla v. Nash*, 117 Mass. 319. "It is the duty of the master, when the nature of the business requires it, to make and promulgate rules for the protection of his servants, and to use due care and diligence, after the making and promulgating of a necessary rule, to have it enforced." *Johnson v. Union Pac. Coal Co.*, 76 Pac. Rep. 1089.

⁴ *Bailey Mas. Liab. Inj. Serv.*, p. 92.

⁵ Judge Bailey's argument is sound and will commend itself to judges and lawyers. Like many of the plaintiff's humane doctrines, in this age of damage suits, a recognition of liability in such a case, seems at variance with settled rules of law.

⁶ *Memphis &c. R. Co. v. Graham*, 94 Ala. 545; 10 So. Rep. 283; *Western Co. v. Moore*, 94 Ga. 457; 20 S. E. Rep. 940; *Labatt Mas. & Serv.*, Sec. 215, p. 479, 480.

be unambiguous, definite and certain.¹ If the master promulgates a rule that is indefinite, ambiguous and uncertain, since the employee, in such case, could not be held guilty of violating a rule he could not understand, the rule would be ignored by the court.²

§ 447. **Rules for signaling should be provided.** — The duty of the master, to so far systematize his business, or to lessen as far as possible, by reasonable rules and regulations, governing the conduct of his employees, the hazards of servants engaged in a dangerous calling, has been considered, in a case that came before an English court, as applied to a mine owner's protection of his employees, engaged in hoisting between the bottom and top of the mine, and the same standard of reasonable care and prudence that prompted the legislatures of so many States in the United States³ to require some uniform system of signals, between the bottom and top of the mine, influenced the court to hold, in the absence of such a statute, that the employer should himself adopt a uniform, regular system of signals, and for a failure so to do, he would be held guilty of negligence.⁴ But it has been held that if an employee, in a mine, knows that a co-employee, in charge of the hoister, has habitually started the cage, without waiting for a signal, and he places himself upon the cage, when there is no necessity therefor, and is killed, by reason of the starting of the cage, his contributory negligence will preclude his recovery.⁵

¹ *Abel v. Del. & Hudson Canal Co.*, 128 N. Y. 662; 28 N. E. Rep. 663.

² *Chicago, Burlington &c. Co. v. McGraw*, 22 Colo. 868; 45 Pac. Rep. 383.

³ See chapter *Statutes Regarding Safety of Miners*.

⁴ *Murdock v. Mackinnow*, 12 Sc. Sess. Cas. (4 Ser) 810.

⁵ *Acme Coal Mining Co. v. McSale*, 5 Colo. App. 267; 38 Pac. Rep. 596.

§ 448. **No rule required for handling ore cars.** — In a recent New York case the question arose as to the necessity for a rule for the purpose of handling ore cars used to transport minerals from the employer's mine. The plaintiff while under one of the cars, clearing mineral off the track, was injured by another car, loosened by a fellow-servant, running down the inclined track and colliding with car where he was employed. The action was based upon the negligence of the employer in failing to establish proper rules for the government of the plaintiff and his fellow-servants, but the court held that no such duty existed, as the details of handling the cars where the appliances were reasonably safe, was a matter for the discretion of the employees.¹ But in Illinois a mine owner was held to be guilty of actionable negligence, who permitted his employees to make a practice of shunting empty cars down against those whereon others were at work, without providing rules governing the conduct of such business, for the protection of those employees employed at work upon the cars.²

§ 449. **Handling ore in bins does not require.** — The handling of ore, in bins provided for the storage thereof, is not such work as to require that the employer should establish rules for the government of the conduct of the employees, engaged in handling such ore. In a New York case, where an employee was injured in a salt bin and it was contended that the master should have provided rules, prescribing the manner of drawing off such salt and loading the bins, and preventing either, while the employees were in the bin, the court held against the plaintiff's theory

¹ *Morgan v. Hudson River Ore and Iron Co.*, 133 N. Y. 666; 31 N. E. Rep. 284.

² *Winona Coal Co. v. Holmquist*, 58 Ill. App. 507.

and denied the duty, on the part of the employer, to prescribe a rule in such a case.¹

§ 450. **Drilling for powder does not require.**—In a case recently decided, in Oregon, it was claimed, by the plaintiff, that the duty of an employee to dig out the tamping from a drill hole, loaded for a blast, which had failed to explode, was such a perilous service that the employer should provide rules controlling the conduct of his servants, engaged in such dangerous employment. The court held, however, that there was nothing in such work, requiring the mine owner to establish rules for the government of his employees, so engaged, but that the manner and mode of accomplishing such duty, as well as the means selected therefor, were mere details of the service, within the discretion of the employees.²

§ 451. **When violation of, contributory negligence.**—An employee who knowingly violates a rule of his employer, intended for his protection, is held as a matter of law, to be guilty of such contributory negligence as will preclude a recovery, if he is injured as a result of the violation of such rule.³ Not only is this true because he would thereby voluntarily undertake the performance of his duty in the more dangerous manner, but also because

¹ *Eastwood v. Retsof Mining Co.*, 86 Hun, 91; 84 N. Y. Supp. 196.

² "There is nothing in the business of drilling out the tamping from a hole loaded for a blast, which has failed to explode, that calls for the promulgation of rules by the master; the selection of means therefor being details depending on the judgment of the workmen." *Johnson v. Portland Stone Co.* (Or. 1902), 67 Pac. Rep. 1013.

³ *Davis v. Nuttall'sburg Coal Co.*, 84 W. Va. 500; 22 S. E. Rep. 539; *Gleason v. Detroit G. & M. Co.*, 78 Fed. Rep. 647; *Senior v. Ward*, 1 El. & El. 385; 10 Mor. Min. Rep. 646; *McCreary v. Ohio &c. Co. v.* 49 W. Va. 301; 38 S. E. Rep. 534; *Bonner v. Moore* (Texas), 22 S. W. Rep. 272; *Southern Pac. Co. v. Ryan* (Texas), 29 S. W. Rep. 529; *Georgia Pacific Co. v. Propst*, 88 Ala. 518; 8 So. Rep. 764.

he would be held to have violated the implied agreement with his employer, to conform himself to his reasonable rules, intended for the protection of his employees.¹ The only issue of fact, in such case, to be submitted to the jury, is the question whether or not the violation of the rule occasioned the injury.² If it did, the employee is precluded from a recovery, and the rule is the same in regard to infants as adults, if the minor had sufficient understanding to comprehend the scope and object of the rule.³ But to prevent a recovery, on account of the violation of a rule, it must have been brought to the attention of the employee;⁴ it must have been enforced by the employer, and the failure to observe the rule must have been the approximate cause of the injury.⁵ It is taken for granted, of course, in the above paragraph that the rule was reasonable and definite and otherwise binding upon the employee, for if it was not, it would not have the effect of controlling his conduct, and, in fact, would not be a valid or binding rule.⁶

§ 452. Same — Violating rule regarding props. — In the absence of a violation, on the part of the employer, of

¹ *Labatt Mas. & Serv.*, Sec. 865, p. 949; *Richmond & D. R. Co. v. Rush*, 71 Miss. 987; 15 So. Rep. 138.

² *Lakebert & Western Co. v. Craig*, 80 Fed Rep. 488; 47 U. S. App. 89; *Southern Pac. Co. v. Ryan (Texas)*, 29 S. W. Rep. 527.

³ *Cullen v. National Metal &c. Co.*, 114 N. Y. 45; 20 N. E. Rep. 831. A servant who knowingly violates his master's rules and is injured, cannot recover. *Davis v. Coal Co.*, 84 W. Va. 500; 12 S. E. Rep. 539.

⁴ *Alabama Mid. Co. v. McDonald*, 112 Ala. 216; 20 So. Rep. 472; *Brown v. Louisville & Nashville Co.*, 111 Ala. 275; 19 So. Rep. 1001; *Port Royal & Western Co. v. Davis*, 95 Ga. 292; 22 S. E. Rep. 883; *Turner v. Norfolk & West. Co.*, 40 W. Va. 675; 22 S. E. Rep. 83.

⁵ *Alabama G. I. Co. v. Roach*, 110 Ala. 266; 20 So. Rep. 182; *Wright v. Southern Pac. Co.*, 14 Utah, 383; 46 Pac. Rep. 374; *Fluhner v. Lake Shore &c. Co.*, 121 Mich. 212; 80 N. W. Rep. 23.

⁶ *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9; 54 N. E. Rep. 567; *Pittsburg & West. Coal Co. v. Estievenard*, 53 Ohio St. 43; 40 N. E. Rep. 725.

a statute regarding props or timbers, it was held, in England, that if an employee knowingly violates a rule of the employer, preventing the mine employees from remaining in their working places, where there was not a sufficient supply of timber, for props, to make such places safe, and he was injured, as a result of the violation of such rule, he would be guilty of such contributory negligence as would preclude a recovery therefor.¹ As to the defense of contributory negligence, in such a case, for the breach, by the mine owners, of a statutory duty to furnish props, the reader is referred to another chapter.²

§ 453. **Same — Rule requiring report of dangerous places in mine.** — Where the employer has promulgated a rule, requiring miners, in his service, to report to a higher authority, the condition of any dangerous places in the roof or other portions of the mine, in order that same may be made safe, and the miners fail to observe such rule, no recovery will be permitted if injury result therefrom. In a West Virginia case, where such a rule existed and the employee had failed to report the dangerous condition of a tunnel, as a result of which an injury resulted, the court held that a case of contributory negligence was made out.³

§ 454. **Same — Rule regarding hoisting of miners.** — The act of hoisting or lowering persons into the mine is

¹ *Harcey v. Glasgow Iron &c. Co.*, 25 Sc. Sess. Cas. (4 Ser.) 903. "In an action for the death of plaintiff's intestate, caused by the falling of a portion of the roof of defendant's mine, printed rules of the company, posted in the mine, warning workmen against risking themselves under bad roofs, and requiring them to ascertain whether places had been made safe before entering them, could not operate to cast any burden of investigation or extraordinary care on deceased; it appearing from the evidence that he could not read." Judgment (1901), 99 Ill. App. 882, affirmed. *Himrod Coal Co. v. Clark*, 64 N. E. Rep. 282; 197 Ill. 514.

² See chapter *Statutes Regarding Safety of Miners*.

³ *Davis v. Coal & Coke Co.*, 34 W. Va. 500; 12 S. E. Rep. 539.

such a dangerous proceeding that where the employer has adopted rules for the safety of his workmen and they violate such rules, no recovery can be had, in case of a resulting injury. In an English case, such a rule was held in force for a reasonable time after the end of each working shift and miners who quit the pit in violation of the rule, an hour after the contract had terminated, were held guilty of such contributory negligence, as to preclude a recovery for a resulting injury.¹ And where the employer had promulgated a rule, requiring the testing, each day, of the hoister rope, a violation of this rule, by a miner, has also been held to preclude a recovery for an injury therefrom.²

§ 455. **Rule need not be pleaded.** — It is not generally held to be necessary to specifically plead the terms of a rule, to enable either an employee or an employer to take advantage of the insufficiency of such rule, or the failure to follow its provisions, as a general allegation of negligence or contributory negligence would be held to fully cover the charge, the rule itself being only an evidential fact going to sustain such charge.³

¹ *Higham v. Wright*, 37 L. T. N. S. 187; 46 L. J. M. C. 223; 10 Mor. Min. Rep. 24.

² The violation, by a miner, of a rule on the part of the employer requiring the testing, each day, of the rope used to let the pitmen down into the mine, will prevent a recovery for injuries from the breaking of the rope. *Senior v. Ward*, 1 El. & El. 385; 10 Mor. Min. Rep. 646.

³ *Alcorn v. Chicago & Alton Co. (Mo.)*, 16 S. W. Rep. 229; *Henry v. Sioux City Co.*, 66 Iowa, 52; 23 N. W. Rep. 260; *Labatt Mas. & Serv.*, Sec. 365, p. 952, and cases cited.

CHAPTER XXII.

WARNING TO INEXPERIENCED EMPLOYEES.

SECTION 456. To what employees warning is due.

457. Same — Youthful employees.

458. What warning is sufficient.

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460. Fellow-servant's negligence combined with failure to instruct.

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464. Exceptional dangers known only to skilled employees.

465. Warning of dangerous properties of dynamite.

466. Same — Explosions, from giant powder.

467. Use of dangerous machinery.

§ 456. To what employees warning is due. — The basis of the master's duty to warn inexperienced employees of hazards they are likely to incur in his business, is the otherwise negligent conduct in exposing his employees to risks, about which they are not informed. The duty, therefore, as to instruction, is based upon the ignorance, or lack of experience of the employee and the master's knowledge, or means of knowledge, of such lack of information, on his part.¹ The liability of the employer does not arise from the greater or less degree of danger which may threaten the employee, but from his negligence, in failing to inform an employee, ignorant of such danger thereof.² As to all dangers of which the master has

¹ *Mayhew v. Sullivan Mining Co.*, 76 Me. 100; *Bailey Mas. Liab. Inj. Serv.*, p. 111; *Labatt Mas. & Serv.*, Sec. 285, p. 524; *Mary Lee Coal Co. v. Champbliss*, 97 Ala. 171; 11 So. Rep. 899.

² *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; 85 N. E. Rep. 162.
"It is the duty of an employer to carefully warn a youthful employee of

knowledge, either actual or presumed, and the servant is ignorant, whether the dangers are obvious or concealed, the master is under the duty of warning the servant, if he had reason to believe, or the law would charge him with notice of the servant's inexperience or lack of information, as to such dangers.¹ As to all servants, therefore, who, because of their inexperience, did not appreciate the risk of their employment, the employer would be under the obligation to warn them of the incident of risks, if he himself had knowledge of the employee's inexperience, or the law would charge him with such knowledge.²

§ 457. Same — Youthful employees. — The courts recognize an exception to the doctrine that an employee assumes all obvious risks, in entering into the contract of employment, in the case of employees who are so youthful that from their want of age or experience, they could not, in advance, understand the nature of the peril they were to encounter in the service.³ No implied contract of assump-

hidden dangers incident to the work engaged in, of which the employee to the employer's knowledge, is ignorant." *E. Patterson & Son v. Cole* (Kan. 1903), 73 Pac. Rep. 54.

¹ *Bannon v. Lutz*, 158 Pa. St. 166; 27 Atl. Rep. 890; *Ford v. Anderson*, 139 Pa. St. 263; 21 Atl. Rep. 18; *Pratt v. Prouty*, 153 Mass. 384; 26 N. E. Rep. 1002.

² *Rolling Mill Co. v. Corrigan*, 46 Ohio St. 288; 20 N. E. Rep. 466. *McGinnis v. Construction &c. Co.*, 49 Mich. 466; 18 N. W. Rep. 819. The duty to instruct a servant applies wherever the master knows or ought to know of the peril, and the servant, because of his inexperience, is ignorant. *Con. Coal Co. v. Haenni*, 146 Ill. 614; 35 N. E. Rep. 162; *Bannon v. Lutz*, 158 Pa. St. 166; 27 Atl. Rep. 890; *May v. Smith* (Ga.), 18 S. E. Rep. 360. And for an injury from a failure to warn an inexperienced servant, master is liable. *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168; 24 S. W. Rep. 106. "It was not necessary for the owners of a mine to warn an employee of the dangers he might encounter if he wandered off the regular path in going to his work, where they furnished him a guide to take him to the place of work." *Smith v. Thomas Iron Co.*, (N. J. Sup. 1903), 54 Atl. Rep. 562.

³ *Tagg v. McGeorge*, 155 Pa. St. 368; 26 Atl. Rep. 671; *Jones v. Florence Min. Co.*, 66 Wis. 268; 67 Am. Rep. 269; 28 N. Y. 207.

tion of risk could arise in the case of such employees, for it would be manifestly unjust to hold that they assumed dangers they knew not of. As to young and inexperienced employees, therefore, the duty is particularly binding upon the employer to give warning or instruction as to the perils of the service, and for a failure to do so the master would be liable in case of injury.¹ In a well considered case, in Pennsylvania, the court observed: "In the case of young persons it is the duty of the employer to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate and to which they should not be exposed. The duty in such case to warn and instruct grows naturally out of the ignorance and inexperience of the employee."² The mere fact of minority, however would not be sufficient to charge an employer with liability for a failure to instruct, if the employee, from his experience or knowledge of the business, would be otherwise presumed to know the dangers of that particular service,³ or if the dangers were obvious to one of his years and experience.⁴

§ 458. What warning is sufficient. — The rule is very generally recognized that in those cases, where any warning

¹ *Ft. Smith Oil Co. v. Stover*, 58 Ark. 168; 24 S. W. Rep. 106.

² *Rummell v. Dillworth & Co.*, 181 Pa. St. 509; 19 Atl. Rep. 345; *Rummel v. Dillworth*, 111 Pa. St. 343; 2 Atl. Rep. 355; *Tagg v. McGeorge*, 155 Pa. St. 368; 26 Atl. Rep. 671.

³ *Bartonshill Coal Co. v. McGuire*, 8 Macq. H. L. C. 311; *Brazil Block Coal Co. v. Young*, 117 Ind. 520; 20 N. E. Rep. 423; *Smith v. Irwin*, 51 N. J. L. 507; 18 Atl. Rep. 852. The mere fact of an employee's minority is not sufficient to charge the master with the duty of instructing him, as to a duty he would otherwise expect him to know. *Alabama Co. v. Marcus*, 115 Ala. 389; 22 So. Rep. 135; *DeGraff v. Railway Co.*, 76 N. Y. 132. But, regardless of his age, if an employer has reason to believe him ignorant or inexperienced in the dangers of his service he is liable in damages for not informing him. *Anderson v. Daly Min. Co.*, 15 Utah, 22; 49 Pac. Rep. 126; *Pantzar v. Iron Co.*, 99 N. Y. 368; *Spicer v. Iron Co.*, 138 Mass. 426.

⁴ *Dougherty v. Iron Co.*, 88 Wis. 343; 60 N. W. Rep. 294.

or instruction at all is required, it is not sufficient to merely advise the inexperienced employee that a given service is attendant with risk or danger, but the employee must be so fully advised, or instructed, that, as a matter of fact, he will understand and appreciate the danger and be enabled, if he heeds the instructions, to avoid it.¹ It is not enough to merely advise an employee of the poisonous properties of the materials he is required to work with, but he should be informed of the effects of such a poison and the means of avoiding it.² An inexperienced employee at work under a gravel bank likely to fall, has been held insufficiently warned by being told to "keep two eyes on the bank and one on the foreman;"³ neither are the vicious propensities of a horse conveyed by a statement that he is "high lived."⁴ In a Michigan case, an employee was engaged to handle molten metal in the neighborhood of water. It was held necessary to instruct him, not only how to handle it in such a manner as to avoid an explosion, but to inform him of the danger of an explosion, unless the instructions were observed.⁵ An instruction placing an ad-

¹ *Brazil Block Coal Co. v. Young*, 117 Ind. 520; 20 N. E. Rep. 428; *South v. Irving*, 51 N. J. L. 507; 18 Atl. Rep. 852; *Chicago Pressed Brick Co. v. Reinneger*, 140 Ill. 334; 29 N. E. Rep. 1106; *Fox v. Peninsular White Lead Works*, 84 Mich. 676; 48 N. W. Rep. 208; *McDougal v. Ashland Sulphite Co.*, 97 Wis. 382; 78 N. W. Rep. 327; 2 Thomp. Neg. Sec., 977; *Wharton Neg.*, Sec. 216; *Labatt Mas. & Serv.*, Sec. 253, p. 571.

² *Fox v. Peninsular White Lead Works*, 84 Mich. 676; 48 N. W. Rep. 208.

³ *Ally v. Hill*, 106 La. 170; 30 So. Rep. 254. In the opinion of the author this case was wrongly decided, as no warning ought to be required as to such an obvious danger as the falling of a bank of earth or gravel, due to putting in operation a familiar natural law. See chapter, *Risks Assumed by Miners*.

⁴ *Wilson v. Sioux Consolidated Mining Co.*, 16 Utah, 392; 52 Pac. Rep. 626.

⁵ *Ribick v. Lake Superior Smelting Co.*, 123 Mich. 401; 82 N. W. Rep. 279; 48 L. R. A. 649.

ditional burden upon the employer of also advising the employee of the "nature, force and probable effects of such an explosion," was held to place too great an onus upon him. A general warning would be sufficient, however, in any case where the danger was of such a nature as to be comprehended by such a warning.¹ All employees of ordinary intelligence are bound to observe the obvious dangers by which they are surrounded, and to govern themselves accordingly; and where the danger is one readily discernible, when one's attention is called to it, a general notice of such fact is sufficient.²

§ 459. **Same — Warning by fellow-servant.** — Where a warning is required from the master he cannot avoid liability by proof that he had selected a competent person to give the warning, for unless it was actually given, the injury could not have been avoided.³ But where actual knowledge of the danger which caused the injury was acquired by the servant, prior to such injury, the means whereby he acquired such knowledge would be immaterial and a warning conveyed to an employee by a fellow-servant, will take the place of a direct warning from the employer.⁴

¹ *Smith v. Winona &c. Co.*, 48 Minn. 87; 48 N. W. Rep. 968; *Pratt v. Prouty*, 158 Mass. 338; 26 N. E. Rep. 1002. And the duty of warning only applies as to perils reasonably to be apprehended. *Benfield v. Vacuum Oil Co.*, 75 Hun. 209; 27 N. Y. Supp. 16.

² *Watson v. Kansas & Texas Coal Co.*, 52 Mo. App. 366; *Aldrich v. Furnace Co.*, 78 Mo. 559; *Allen v. Jakel*, 115 Mich. 484; 73 N. W. Rep. 555.

³ "Where, in the discharge of the master's duty, a warning is necessary to be given to an employee, it is not enough that the master has provided a competent person to give the warning, but the warning must be actually given." *Coffeyville Vitrified Brick & Tile Co. v. Shanks* (Kansas, 1904), 76 Pac. Rep. 856.

⁴ Warning from a fellow-servant will take the place of direct warning from the mine owner. *Alabama Collinsville Coal Co. v. Pitts*, 98 Ala. 285; 13 So. Rep. 135.

§ 460. **Fellow-servant's negligence combined with failure to instruct.** — Since a master is not relieved from the effects of his own negligence, simply because the negligence of a fellow-servant concurred to produce the injury complained of, an injury due to a failure to instruct an employee as to dangers in the service which he did not appreciate, will render the employer liable, although the negligence of a fellow-servant with the injured employee combined with that of the master to produce the injury.¹ "It is only when he has been properly instructed and knows the dangers of his employment, that he stands upon the same footing as any other employee and can not recover for an injury caused by a fellow-servant."² Where the injury could not have occurred but for the negligence of a fellow-servant, however, and it was not reasonably to have been anticipated by the employer, it is held, in New York, that the master is not liable for a failure to instruct.³

§ 461. **When danger was not anticipated — Employee's negligence.** — Where a given danger was not such a one as to have been anticipated by the employer, then he can not be charged with negligence for failing to give warning of such a peril.⁴ The master also has a right to assume that his employees will do their duty and will not be negligent and no duty of instruction can be predicated as to probable dangers, arising from employee's negligence,⁵

¹ *Jones v. Florence Mining Company*, 66 Wis. 288; 28 N. W. Rep. 207; *Hunt v. Desloge Con. Lead Co.* (Mo. App. 1904), 79 S. W. Rep. 710.

² *Bailey's Mas. Liab. Inj. Serv.*, p. 126.

³ *Simpson v. Gerken*, 19 App. Div. 68; 45 N. Y. Supp. 1100.

⁴ *Labatt Mas. & Serv.*, Secs. 286, 287.

⁵ The master had a right to assume that his employees, being competent, would not be negligent, and it was not his duty on employing plaintiff to inform him of possible or probable dangers in case they were negligent. *Klos v. Hudson River Ore & Iron Co.* (N. Y. Sup. 1902), 72 N. Y. S. 156.

nor can such instruction be held necessary in a case where it was not customary to give instruction.¹ But where a master knows of his servant's inexperience and want of information about a given peril, he cannot avoid the consequence of a failure, on his part, to give such servant a timely warning of the peril, by the fact that the servant did not use the same degree of skill to avoid injury, as the more experienced servants used, for the absence of such skill was the very fact which made the instruction, or warning, necessary.²

§ 462. **Ordinary obvious dangers — No warning required.** — The duty of instructions, or warning, only exists as to such unusual dangers as the master, in the exercise of due care, should have foreseen that his employees, or a given employee, would not understand and appreciate. As to the ordinary dangers, or risks, of the service, therefore, no notice or instruction is required to a skilled employee.³ And where the employee has acquired a knowledge of the danger, as well as the employer, no notice is required, for this would be a mere useless pro-

¹ Where it is not customary to give warning in a given case, then no negligence can be predicated upon a failure to give. *Lehigh Co. v. Hayes*, 128 Pa. St. 294; 18 Atl. Rep. 807; 24 M. M. C. 559; *S. W. Va. Co. v. Anderson*, 9 S. E. Rep. 1015; 18 Va. L. J. 684; *Reinder v. Coal Co. (Ky.)*, 18 S. W. Rep. 719. Warning of the danger of the raising of a coal chute, by the starting of machinery, is not necessary, as an injury from such a cause is not likely. *Porter v. Silver Cr. & M. Coal Co.*, 84 Wis. 84; 54 N. W. Rep. 1019. But as to liability of injury from falling coal, over sides of chute, see *Crown Coal Co. v. Hides*, 43 Ill. App. 310.

² *Anderson v. Daly Mining Co.*, 15 Utah, 22; 49 Pac. Rep. 126. "Where a servant who has been employed in a branch of the master's business where there is but little danger is assigned to work in a hazardous branch, it is the duty of the master to give proper instructions and warning as to the character of his new employment." *Giordano v. Brandywine Granite Co. (Del. 1901)*, 52 Atl. Rep. 332.

³ *Consolidated Coal Co. v. Schneller*, 43 Ill. App. 619.

cedure, in such a case,¹ and the rule is the same as to obvious dangers, or such as the employee ought to have discovered² and as to all such dangers the doctrine of assumed risk discussed elsewhere in this work applies,³ and the employer would be without liability. In Alabama the rule has been held to be that if the peril is one that "could be seen and known, by ordinary care and prudence," then no duty of warning exists, but if the danger "was obscured and could not be seen or appreciated," then the master is under the obligation to give a timely and sufficient warning.⁴

§ 463. **Increased risks — Dangerous roof — Excavations.** — Wherever the progress of the work, such as excavations in mining, has brought about new or changed conditions, which would increase the perils of the employees, unacquainted therewith, then the employer is bound to disclose such increased dangers to his employees, and for a failure to do so, is guilty of actionable negligence, in case of injury.⁵ A member of a night shift, in a mine, has, for example, been held entitled to notice of the undermining of a shaft, by the day crew which rendered

¹ *Junior v. Mo. E. L. & P. Co.* (Mo.), 29 S. W. Rep. 988. "A warning is never required from a master to a servant, if apprised of the peril, or when it is obvious, simply because the law does not require a wholly superfluous thing to be done." *Herbert v. Mound City Co.*, 90 Mo. App. 805. "Failure of a master to instruct an employee as to a danger which he otherwise learned does not affect the master's liability." *Blair v. Heibel* (Mo. App. 1908), 77 S. W. Rep. 1017.

² There is no duty to warn employees of obvious dangers. *Dougherty v. Iron Co.*, 88 Wis. 343; 60 N. W. Rep. 274.

³ See chapter *Risks Assumed by Miners*.

⁴ *Holland v. Tennessee Coal, Iron & Co.*, 91 Ala. 444; 8 So. Rep. 524; 12 L. R. A. 282. As to manifest dangers, see *Casey v. Pennsylvania Asphalt & Co.*, 198 Pa. St. 348; 47 Atl. Rep. 1128; *Han. v. Detroit Copper & Co.*, 66 Mich. 297; 38 N. W. Rep. 395; *Lemoine v. Aldrich*, 177 Mass. 89; 58 N. E. Rep. 178.

⁵ *Bank v. Effingham*, 63 Ill. App. 223; *Maryland Coal Co. v. Campbell*, 97 Ala. 171; 11 So. Rep. 897; *Brennan v. Gordon*, 118 N. Y. 489; 28 N. E. Rep. 810; 8 L. R. A. 818.

it more dangerous.¹ A day crew again, were held not to assume the risk of a changed condition in the face of the coal they were engaged in mining,² and a miner engaged in sinking a shaft who had no notice of a dangerous fissure in the side of the shaft, was held entitled to a warning of such a peril, by his employer.³ Where the fissure or crevice in a bank of earth is open to plain observation, however, an employee is bound to take notice thereof and for an injury from such a cause, although he was ignorant thereof, if he had the same means of information as his employer and failed to avail himself of such means, he is held not entitled to instruction, but assumes the risk of such obvious defects.⁴

¹ *Iroquois Furnace Co. v. McCrea*, 91 Ill. App. 837.

² *Consolidated Coal Co. v. Gruber*, 188 Ill. 584; 57 N. E. Rep. 254. Removing pillars so as to cause roof to fall, is negligence unless proper warning is given. *Cunningham v. M. P. Co.*, 4 Utah, 206; 7 Pac. Rep. 795. "Where the operation of a shale pit from thirty to thirty-five feet deep, with steep walls, requires massive fragments of shale, loosened by blasting, to be thrown down at irregular intervals from the top of the pit upon the place at the foot of the wall where men are required to work, and whose duties prevent them from properly protecting themselves against injury from the falling shale, it is the master's duty to make efficient and permanent provision for warning signals to be given in time for such employees to avoid injury." *Coffeyville Vitrified Brick & Tile Co. v. Shanks* (Kan. 1904), 76 Pac. Rep. 856.

³ *Strahlendorf v. Rosenthal*, 80 Wis. 674, a leading case.

⁴ *Aldrich v. Furnace Co.*, 78 Mo. 559. An experienced miner who steps into a shaft without looking for a descending cage, assumes the risk of injury therefrom, and is entitled to no warning. *McDonald v. Rockhill Iron Co.* (Pa.), 19 Atl. Rep. 797; *Rickert v. Stephens*, 133 Pa. 538; 19 Atl. Rep. 410. In *Coffeyville Vitrified Brick & Tile Co. v. Shanks* (Kan. 1904), 76 Pac. Rep. 856, the plaintiff was employed in a shale pit. The pit boss told the men under him to pay attention to their work and he would always inform them when the shale was to be thrown down. A huge block of 1,500 pounds fell without his warning and crushed the plaintiff. A judgment for the plaintiff was affirmed. "The pit boss undertook to perform the function of the vigilant eye and ear and the cautious judgment for his men. They were not fellow-servants because the master was bound to give a warning, and the grade of the co-servants is immaterial in such a case." 16 Am. Neg. Rep. 154.

§ 464. **Exceptional dangers, known only to skilled employees.** — In the business of mining, in all of its different departments, there are more or less risks attendant upon the duties of the business, which are known only to the skilled employees, and as to dangers not known to employees of only ordinary intelligence or experience, the duty rests upon the employer to warn his employees who are ignorant of such dangers. Illustrative of this doctrine is the leading case of *McGowan v. LaPlata Mining and Smelting Company*, where the injury complained of resulted from an explosion, caused by pouring hot slag into water, that was near the furnace, in the defendant's smelting works. The negligence charged was the defendant's failure to inform the employee of the explosive power of the hot slag, on coming in contact with water. The court, upon this feature of the case, very pertinently remarked: "The explosive power of hot slag, when cast into water, is not within the intelligence of ordinary men. It is doubtful whether many people of education know the force and violence of such an explosive. It is not so much a question whether the injured party has knowledge of all the facts of his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known, if he cannot make the deduction that peril arises from the relation of the facts? The peril may be a fact, in itself, of which he should be informed."¹ A similar holding was recently announced, in Missouri, by the St. Louis Court of Appeals, where the danger arising from a steam explosion caused by throwing water upon hot ashes, was held to be such an exceptional risk and not so generally understood by ordinary employees, as to require instruc-

¹ *McGowan v. La Plata Mining & Smelting Co.*, 8 McCrary, 393; 9 Fed. Rep. 861; *Consolidated Coal Co. v. Wambacher*, 134 Ill. 57; 24 N. E. Rep. 627.

tion.¹ It is likewise held in Michigan, that an employer is under the legal duty to advise his employees of the poisonous character of articles they are required to handle and of the danger of coming in contact with, or inhaling the fumes from, such substances,² and the Missouri Court of Appeals at Kansas City, has held that the employer is bound to keep pace with scientific discoveries and progressions of his business to ascertain the dangerous features thereof and for a failure to warn an employee that disease or injury may be contracted or effected from certain conditions of which ordinary men are not advised, such employer would be liable, in damage, in case of a resulting injury.³ But this rule of liability as to the exceptional dangers covering injuries to employees of little or no experience in the business does not apply as to skilled employees familiar with the exceptional risks of the service, for as to such employees it is very generally held, the master owes them no duty of instruction.⁴

¹ *Hunt v. Desloge Lead Co.* (Mo. App. 1904), 79 S. W. Rep. 710; *Downing v. Allen*, 6 Mo. App. 195.

² *Fox v. Peninsular White Lead Works*, 84 Mich. 676; 48 N. W. Rep. 209. See, for danger from molten pot of copper coming in contact with water, *Ridick v. Lake Superior Smelt. Co.*, 82 N. W. Rep. 279; 48 L. R. A. 649.

³ Danger of infectious disease from bacteria. *Hysell v. Swift*, 78 Mo. App. 39.

⁴ In Missouri as to a skilled employee in chemicals, the master owes no duty of instruction, but he is held to assume the risk of an explosion from a given compound. *Hill v. Meyer Bros.*, 149 Mo. 433; 41 S. W. Rep. 909. No notice is necessary of the ordinary dangers of a particular service to a skilled employee. *Coal Co. v. Schneller*, 42 Ill. App. 619. Master was held liable for the death of an inexperienced employee in obeying an order to pour water on hot ashes, as a result of which he was scalded to death, in Missouri, in *Hunt v. Desloge Con. Lead Co.*, 104 Mo. App. 377; 79 S. W. Rep. 710. "Where extraordinary risks may be encountered, known to the master or which should be known by him, the servant should be warned of their character and extent so far as possible." *Illinois Steel Co. v. Ryska*, 103 Ill. App. 347; judgment affirmed, 65 N. E. R. p. 734.

§ 465. **Warning of dangerous properties of dynamite.**—An employer is under no duty to warn an experienced employee of the dangerous properties of dynamite, for he has a right to presume that he is familiar with the dangers of a substance he is engaged, as a skilled miner, to handle.¹ But if the employee, engaged to work with dangerous explosives, is ignorant of the dangerous properties of such substance and the employer is aware of his ignorance or inexperience and fails to warn him of such dangers, he will be liable, in case of injury to such inexperienced employee, for a failure to give such warning.²

§ 466. **Same — Giant powder explosions.** — The United States Supreme Court has recently considered the duty of the employer as to instruction of uninformed employees in regard to danger from powder explosions, and it was held that the danger from an explosion, caused by the jarring of machinery, or the overheating of a room, is one that the employer is bound to know and is not within the knowledge of an ordinary machinist, unless he has been specially instructed.³ The employer has also been held under the duty of giving timely warning to employees of blasts about to be discharged,⁴ and to disclose to miners

¹ *Livengood v. Joplin Lead & Zinc Min. Co.*, 77 S. W. Rep. 1077.

² An employer's ignorance of the dangerous qualities of a high grade explosive is no excuse for not advising an employee of its qualities, if he is inexperienced. *Bertha Zinc Mining Co. v. Martin*, 93 Va. 791; 22 S. E. Rep. 869. The master should advise an inexperienced servant that a jar or blow will explode dynamite, and one injured, when not so advised, does not assume the risk. *Grimaldi v. Lane*, 177 Mass. 565; 59 N. E. Rep. 451.

³ *Mather v. Rillston*, 156 U. S. 391; 39 L. C. P. Ed. 464; 15 Sup. Ct. Rep. 464.

⁴ "Where an employer furnishes a servant, assisting in making an excavation, with a tent for sleeping at a place made dangerous by the discharging of blasts, he owes such servant the duty of giving him timely warning to enable him to avoid the danger." *Orman v. Salvo* (U. S. C. C. A., Col. 1902), 117 Fed. Rep. 233.

not advised thereof, the fact of a missed shot, or unexploded blast, so that care could be observed to prevent an explosion therefrom.¹ But the employer is under no duty of advising a skilled employee of the danger of tamping dynamite with an iron bar, for this is a risk that is incident to the business and that every skilled miner understands.² Nor would an employer be negligent in failing to instruct a miner of four or five years experience as to the proper way to handle powder, in charging drill holes, for he would have a right to rely on his experience to prompt him to handle it in an approved, careful manner.³ An employee, however, who has been accustomed to use powder of a certain grade of nitroglycerine, is entitled to a warning, or notice, in case of a change or substitution of a higher grade explosive, and for a failure to give such warning, in case of the substitution of a more dangerous explosive, and a resulting injury, the employer would be liable.⁴

¹ It is the duty of a retiring shift boss to disclose to the oncoming shift a missed shot in the mine. *Shannon v. Con. Poorman Co.*, 24 Wash. 1.9; 64 Pac. Rep. 169.

² The master is not bound to disclose to an experienced miner the danger of tamping a drill hole of dynamite, with an iron bar. *King v. Morgen*, 109 Fed. Rep. 446; *Kahn v. McNulta*, 147 U. S. 238; 37 L. Ed. 150; *Peterson v. Coke Co.*, 149 Ind. 260; 49 N. E. Rep. 8.

³ "Where a miner, who had been employed four or five years in drilling holes for blasting with dynamite, had worked at some fifty different mines, and for periods varying from a day to a week, at putting charges of dynamite into the holes and exploding them, becoming thereby familiar with the details of this work, and knowing the nature and properties of dynamite, his employer was guilty of no negligence in putting him to work regularly at charging the holes, without warning him of the danger involved." *Northern Alabama Coal, Iron & R. Co. v. Beacham* (Ala. 1904), 87 So. Rep. 237.

⁴ "A miner, employed in blasting with powder of a certain explosive quality, does not assume the risk incident to a substitution, without notice to him, of a powder of higher explosive power and more dangerous character; he having a right to rely on the master's performance of

§ 467. **Use of dangerous machinery.**— One of the most frequent causes of injury to ignorant and inexperienced employees arises from the use of dangerous and complicated machinery. With reference to the master's duty to instruct youthful employees, in the use of machinery, the Pennsylvania court has laid down the following rule: "When young persons, without experience, are employed to work with dangerous machines, it is the duty of the employer to give suitable instructions as to the manner of using them and warning, as to the hazard of carelessness in their use. If the employer neglects this duty, or if he gives improper instructions, he is responsible for the injury resulting from his neglect of duty."¹ But where an employee, although a minor, is of ordinary intelligence, he cannot found a right of action upon the master's failure to warn him of the danger from the use of a given machine, if the dangers therefrom are obvious and could not have been made plainer to him, by instructions.² This rule is very generally applied to such apparent dangers as the contact of the hand or clothes in cog-wheels or revolving

the duty of notification." *Chambers v. Chester* (Mo. 1908), 72 S. W. Rep. 904. Where an employer refers a workman to another employee, of large experience, as to the best method to pursue to thaw out dynamite and the instructions are followed and an explosion results, the master is not liable for injury caused thereby. *Welch v. Grace*, 167 Mass. 590; 46 N. E. Rep. 887.

¹ *Tagg v. McGeorge*, 155 Pa. St. 368; 26 Atl. Rep. 671. See, also, *Taylor v. Wooton*, 1 Ind. App. 188; 27 N. E. Rep. 502; *Wynne v. Conklin*, 86 Ga. 40; 12 S. E. Rep. 188. "A young and inexperienced person, employed, to operate a dangerous machine, should be instructed as to the manner in which the service may be safely performed, and the risk incident to it, and how it may be avoided, and admonished against the dangers of carelessness." *Welch v. Butz* (Pa. 1902), 51 Atl. Rep. 591; 202 Pa. 59.

² *Coullard v. Tecumseh Mills*, 151 Mass. 85; 23 N. E. Rep. 781.

cylinders, and, notwithstanding the youth of the employee, such dangers are generally held to be assumed.¹

¹ "Failure of the master to warn a servant as to the dangerous nature of a part of a machine was not negligence, where the servant knew of that part of the machine and the manner in which it operated." *McManus v. Davitt*, 88 N. Y. S. 55; 94 App. Div. 481; *Demers v. Marshall*, 178 Mass. 9; 59 N. E. Rep. 454. See, also, *Cuniack v. Merchants & Co.*, 146 Mass. 182; 15 N. E. Rep. 579; *Crowley v. Pacific Mills*, 148 Mass. 228; 19 N. E. Rep. 344; *Gilbert v. Guild*, 144 Mass. 601; 12 N. E. Rep. 868; *Wilson v. Cotton Mills*, 169 Mass. 67; 47 N. E. Rep. 506; *Cunningham v. Bath Iron Works*, 92 Me. 501; 48 Atl. Rep. 106; *Inglenmon v. Moore*, 90 Cal. 410; 27 Pac. Rep. 806.

CHAPTER XXIII.

INJURIES FROM FAILURE TO INSPECT.

SECTION 468. The duty, independent of statute.

469. Necessity for inspection must appear.

470. Purchased and manufactured appliances.

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472. As to latent defects in appliances.

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477. Inspection of boilers.

§ 468. **The duty, independently of statute.**— No reference, in this chapter, will be made to the duty of inspection, under the various mining statutes of the United States, as construed in the numerous decisions thereunder, as such statutes and their constructions are treated of elsewhere in this work.¹ The inspections treated of in the present connection are those required by the rules of the common law, on the part of the employer, either in regard to the place of work, or the purchase or manufacture of a given appliance, or its use, subsequent thereto, in order to protect the employee against the risk of unexpected dangers, resulting from the use of such appliance, or the place of work.² The duty of inspection is a correlative duty to that existing upon the part of the employer to furnish reasonably safe machinery and appliances, and arises from the necessity that such should be kept reasonably safe. The only way in which this can be done is for the employer to

¹ See chapter *Statutes Regarding Safety of Miners*.

² *Labatt Mas. and Serv.*, Sec. 152, 165; *Balley Mas. Liab. Inj. Ser.*, pp. 98, 108.

make reasonable and proper tests and examinations of the appliances in use by his employees, hence, the duty to make such examinations, or inspections, a breach of which, connected with a resulting injury to an employee, will render the employer liable in damages.¹ The reasonable protection of the employee, which is the basis of the duty of inspection, will not permit the employer, having furnished a reasonably safe place or appliances, to remain passive. "The duty of inspection is affirmative and must be continuously fulfilled and positively performed."²

§ 469. **Necessity of inspection must appear.** — Those appliances in use that are attendant with the most danger require the most frequent inspection, as do those that are subjected to unusual strain or wear, as such are most liable to cause injuries. But before an employer can be held negligent in failing to inspect a given appliance the necessity for an inspection must usually be made to appear; it must have been customary to make such inspection, or the appliance must be one that the employer, in the exercise of ordinary care, on his part, would or should have seen the necessity to inspect.³ But in the use of dangerous appliances reasonable and proper care would require frequent and careful inspection, to prevent injuries to employees, and where the appliance is such as to require it, this duty must be constantly performed and for an injury from a breach of such duty, the employer is liable.⁴

¹ *Coukey v. Belleville Stone Co.*, 59 N. J. L. 226; 86 Atl. Rep. 473; *Armour v. Brazeon*, 191 Ill. 117; 30 N. E. Rep. 904.

² *Braun v. Chicago &c., Co.*, 58 Iowa, 595; 6 N. W. Rep. 5; 36 Amer. Rep. 248.

³ *Morgen v. Hudson River Ore & Iron Co.*, 133 N. Y. 666; 31 N. E. Rep. 234.

⁴ *Northern Pac. Co. v. Herbert*, 116 U. S. 652; 6 Sup. Ct. Rep. 570; *Brown v. Chicago &c. Co.*, 58 Iowa, 595; 6 N. W. Rep. 5.

§ 470. **Purchased and manufactured appliances.** — As regards the liability of the mine owner for injuries from a failure to inspect appliances, there is a well-recognized distinction between appliances that are manufactured by the employer himself, and those purchased by him from some reputable dealer or manufacturer.¹ As to appliances or instrumentalities manufactured by the employer, he is held liable for injuries from any defects that he discovered, or ought to have discovered, by the exercise of ordinary care, on his part,² and unless there was negligence in the construction of an appliance he himself manufactured, the mere fact of proper inspections, after it was put into use, would not release the employer of liability.³ But if the employer is not, himself, the manufacturer of his appliances, but has acquired the same, by purchase, from some reputable manufacturer, or contractor, in the absence of circumstances that would put a reasonably prudent person upon inquiry, no liability could, ordinarily, be predicated against the employer, on account of defects in the appliance so purchased.⁴ In purchases of appliances, the employer has a right, without inspection, to presume that proper tests have been made,⁵ but as to those which he himself made he must perform the duty that he had the right to expect others to perform, in the case of a purchase.⁶

¹ *Daly v. Lee*, 57 N. Y. Supp. 293; 39 App. Div. 188.

² *Tennessee Coal, Iron &c. v. Carrier*, 108 Fed. Rep. 19; 47 Ct. Cd. App. 161.

³ *Crown Coal Co. v. Hills*, 48 Ill. App. 810.

⁴ *Cooley Torts*, p. 557; *Bailey Mas. Liab. Inj. Serv.*, p. 95; *Ardesco Oil Co v. Gilson*, 68 Pa. St. 150; *Boswell v. Laird*, 8 Cal. 469; *Richmond &c. Co. v. Elliott*, 149 U. S. 266; 18 Sup. Ct. Rep. 887; *Shea v. Wellington*, 163 Mass. 364; 40 N. E. Rep. 173.

⁵ *Richmond &c. Co. v. Elliott*, 149 U. S. 266.

⁶ *Crown Coal Co. v. Hills*, 48 Ill. App. 810. The employer owes the employee no duty to inspect exploders. *Shea v. Wellington*, 163 Mass. 364; 40 N. E. Rep. 173. But see, as to boilers, *Johnson v. Boston &c. Min. Co. (Mont.)*, 40 Pac. Rep. 298.

471. Ordinary common tools—No duty to inspect. — In the use of ordinary small tools, such as picks and shovels, drills and the usual small tools used around a mine, there is no duty on the part of the employer to inspect, but he has a right to expect those of his employees who are using such tools to report any needed repairs or the existence of any defects.¹ The employee, as to the common tools of every-day use, is supposed to know as much about them as the employer and the courts recognize this fact and permit the employer to rely upon the discretion and knowledge of the employee, as to the fitness of such tools for service, and for an error of judgment about such matters, the employee, and not the employer, is held to be to blame.²

§ 472. As to latent defects in appliances. — Where an injury results from a defect in an appliance, before a failure to inspect will furnish a basis of recovery, it must appear that the defect was one which an ordinarily careful inspection would have disclosed, for if the defect was one which could not have been discovered by the exercise of ordinary diligence, a failure to make such a discovery could not be considered negligence.³ But if the defect is one that was open to visual observation,⁴ the employer must observe it and cannot “shut his eyes” to his obligation to maintain a reasonably safe place.⁵ The mere fact that the employer had failed to discover the defect will not, of itself, relieve the employer, but to excuse him on the ground of a latent defect it must

¹ *Miller v. Erie Co.*, 47 N. Y. Supp. 285; 21 App. Div. 45.

² *Wachsmuth v. Shaw & Co.*, 118 Mich. 275; 76 N. W. Rep. 497; *Labatt Mas. & Serv.*, Sec. 154, p. 331.

³ *Quintona v. Consolidated K. C. Smelting & Ref. Co.*, 14 Tex. Civ. App. 347; 37 S. W. Rep. 369.

⁴ *Erskine v. China Valley Co.*, 71 Fed. Rep. 270.

⁵ *Burns v. K. C. F. S. & M. Co.*, 129 Mo. 41; 31 S. W. Rep. 347.

be shown that proper and competent inspections were made and no defect would be considered a latent defect which would have been disclosed by a reasonably careful inspection.¹ And a failure to inspect at all is generally sufficient to predicate an action upon, in case of a resulting injury from a defective appliance²

§ 473. Roof of drift should be inspected. — Under the mine employer's duty to provide a reasonably safe place for his employees to work, the employer is held bound to inspect the roof of his mine and drifts, at proper intervals, to prevent loose rock or dirt from injuring the men working under the roof.³ On account of the effect of blasting upon the props and timbers in mines, where the ground is timbering ground, there is a greater necessity for inspections than would otherwise exist, and to prevent the displacement of the timbers, the owner is required to adopt more frequent inspections.⁴ The fact that the character of the formation of the roof is such that the rock is apt to disintegrate and fall at unexpected intervals, will not excuse the duty of inspection, but this fact only accentuates the necessity for inspections and the adoption of proper precautions to protect the miners against such unexpected

¹ *Flanigen v. Guggenheim Smelting Co.*, 68 N. J. L. 647; 44 Atl. Rep. 762; *Watts v. Hart*, 7 Wash. 178; 34 Pac. Rep. 423; *McMillan Marble Co. v. Black*, 89 Tenn. 118; 14 S. W. Rep. 479; *Chune v. Restine*, 94 Fed. Rep. 745; 36 C. C. A. 450; *Spicer v. South Boston Iron Co.*, 138 Mass. 426.

² *International & G. N. Co. v. Elkins (Texas)*, 53 S. W. Rep. 931; *Weiden v. Brush Electric Co.*, 43 Mich. 268; 41 N. W. Rep. 269.

³ If the owner has failed to examine the roof of his mine, in constructing a gangway, the case is properly submitted to the jury, where there is an injury from loose coal from the roof. *Vanesse v. Catsberg Coal Co.*, 159 Pa. 408; 28 Atl. Rep. 200. "Notice of defective conditions to a mine manager and to a mine examiner, or to either of them, is notice to a mine owner." *Riverton Coal Co. v. Shepherd*, 111 Ill. App. 294.

⁴ *Eddy v. Aurora Iron Min. Co.*, 81 Mich. 548; 46 N. W. Rep. 17.

occurrences.¹ The employer has been held excusable where the inspector had tried and was unable to dislodge the mass of rock that subsequently fell, by prying upon it with a pick.² No negligence is properly predicated upon an unsuccessful effort, after a blast, to pry down a boulder, with an iron bar,³ or where a derrick was used to attempt to dislodge the loose or dangerous looking rock,⁴ for such efforts would bear evidence of reasonable and proper care upon the employer's part. And as the basis of the liability is the absence of such care, if careful inspections have been made, there is, generally, no liability upon the part of the employer.⁵

§ 474. **Inspection of scaffolds and derricks.** — In the construction of scaffolds and derricks; the employer is generally responsible for injuries from inherent defects in the material or construction, whenever the defect was one that was discernible by a proper inspection. Where the evidence shows that the material for a scaffold or derrick was rotten or defective, the question should generally be submitted to the jury, whether the condition ought to have been known to the master, had he properly performed his duty of inspection.⁶ If the defect in the scaffold or derrick existed at the time it was constructed, the maker is generally held to be negligent in not having discovered such defect and taken the proper precaution to prevent

¹ *Pantzor v. Tilly Foster Iron Min. Co.*, 99 N. Y. 368; 2 N. E. Rep. 24.

² *Finalyson v. Utica Min. & Mill. Co.*, 67 Fed. Rep. 519; 14 C. C. A. 492, opinion by Caldwell, J. (dissenting).

³ *Bennett v. Titanic Iron Co.*, 9 Utah, 291; 34 Pac. Rep. 61.

⁴ *Coposo v. Woolfolk*, 163 N. Y. 472; 57 N. E. Rep. 760.

⁵ If a proper inspection was made the day of the accident, this is conclusive evidence of proper and reasonable care. *Southwest Virginia Imp. Co. v. Andrews*, 86 Va. 270; 9 S. E. Rep. 1015.

⁶ *Roberts v. Smith*, 2 Hurlst. & N. 213; 23 L. J. Exch. (N. S.) 319; *Yaw v. Whitmore*, 46 App. Div. 422; 21 N. Y. Sup. 731.

injury therefrom; ¹ but if the defect arose at a period subsequent to the construction of the derrick or scaffold, the employer would not be liable for an injury caused thereby, unless he had notice of the defect, or had failed to properly inspect the appliance and obtain such notice.² Where the appliance is likely to be subjected to great strains, from blasts or other causes, more frequent inspection ought to be made than where such causes do not exist,³ and generally the employer is liable for injury resulting from a failure to inspect, whenever under the circumstances, in the exercise of due care on his part, an inspection should have been made.⁴ But where the defect in the scaffold or derrick is not open to a visual and proper inspection, but consists in some latent defect, of which the employer was without notice, he would not generally be held responsible for an injury from such a cause, for, in such case, he would not be negligent in not discovering that which he could not find out, by the exercise of due care upon his part.⁵

§ 475. Powder and similar explosives. — On account of the dangerous nature of giant powder, an employer is bound to adopt such reasonable precautions as will minimize the danger from the explosive character of such material, to his employees, and to keep such material in a reasonably

¹ *McBeath v. Rawle*, 98 Ill. App. 212.

² *Chicago &c. Co. v. Maroney*, 170 Ill. 520; 48 N. E. Rep. 953, affirming 67 App. 618.

³ *Eddy v. Aurora Iron Min. Co.* 81 Mich. 548; 46 N. W. Rep. 17.

⁴ *Welsh v. Cornell*, 49 App. Div. 208; 68 N. Y. Supp. 44; *Dyer v. Pittsburg Co.*, 198 Pa. St. 182; 47 Atl. Rep. 979; *Houston v. Brush*, 66 Vt. 831; 29 Atl. Rep. 380.

⁵ Evidence that a scaffold, before an injury, had a depression so slight that it had escaped the notice of those who had carefully examined it, is not sufficient to charge the employer with negligence in not discovering it. *Kaare v. Troy Steel and Iron Co.*, 139 N. Y. 869; 84 N. E. Rep. 901.

safe condition, proper inspection should be made, where it is stored in large quantities, or is subject to conditions likely to produce an explosion.¹ It has been held, in Missouri, however, that a mine employer is not bound to inspect blasts for unexploded shots and to inform employees thereof, as this is a risk incidental to the business and one assumed by all experienced miners.² And in Massachusetts, it has been held that a quarry owner owes no duty to his employees to inspect exploders, purchased from reputable manufacturers, as none but an expert could properly inspect such articles, and it would be unreasonable to require inspections of such things by those who knew nothing about them.³

§ 476. Ropes and cables should be subjected to inspection.—In a Pennsylvania case,⁴ the duty of an employer with reference to the inspection of ropes and cables used in his service, which are subjected to more or less friction, was discussed and the court used the following language: “The master is bound to know that a rope, under such circumstances, will last only a limited time. It will not do for him to furnish a sound rope and then fold his arms until, by actual breaking, it is demonstrated to be insecure. It will not do to say that the servant is bound to know this, as well as the master, and to warn him that after such a time he ought to secure a new rope. Is the servant bound to notify the master of that which he knows, or ought to know, himself, without such information? He knows how long the rope has been in use; the servant may not know.” This rule should be applied, particularly as

¹ *Spelman v. Eisler Iron Co.*, 56 Barb. 151; *Mather v. Billston*, 156 U. S. 762. See chapter *Injuries from Powder Explosions*.

² *Livengood v. Joplin Min. & Smelt. Co.*, 77 S. W. Rep. 1107.

³ *Shea v. Wellington*, 168 Mass. 364; 40 N. E. Rep. 173.

⁴ *Baker v. Allegheny Valley Co.*, 95 Pa. 211; 40 Am. Rep. 634.

to ropes or cables used in mining, for they are not only subject to constant friction, where used for hoisting and lowering persons and mineral into the mines, but quite frequently the safety of human lives depends upon the good condition of such appliances. The rule is quite general, therefore, that such appliances should be subjected to "ordinary and proper tests."¹ It has been held that an employer is not, as a matter of law, free from negligence, where, for a period of several months, he had not inspected a rope, subject to constant friction;² and if, from any cause, he has knowledge that such an appliance is defective, he should submit it to a proper inspection,³ or in case of an injury is liable to be made to respond in damages for his neglect.

§ 477. **Inspection of boilers.** — The rule which requires the employer to inspect machinery or appliances used in his service, where, from the nature of the appliance, or the use made of it, danger is attendant upon its use, without reasonable and proper inspections, is held to apply to a boiler, used by a mine employer.⁴ Of course the employer would not be required to subject a boiler to an inspection until the use made of it would be of such duration as to somewhat affect its condition, as to safety, and he would not, within any definite period, perhaps, be required to examine or inspect a boiler, purchased by him from a reputable manufacturer.⁵ But where a boiler had been in use for eighteen years, and the experts, on the question of

¹ *Keesville Iron Co. v. Dobson*, 7 La. 369; *Linton Coal & Iron Co. v. Parsons*, 11 Ind. App. 264; 39 N. E. Rep. 214.

² *McGuigan v. Beatty*, 136 Pa. St. 329; 40 Atl. Rep. 490.

³ *Purcell Mill & Co. v. Kirkland*, 2 Ind. Ter. 169; 47 S. W. Rep. 311; *Hoffman v. Dickinson*, 31 W. Va. 142; 6 S. E. Rep. 58.

⁴ *Johnson v. Boston Co. Mining Co. (Mont.)*, 40 Pac. Rep. 298.

⁵ *Schroeder v. Michigan Co.*, 56 Mich. 132; 22 N. W. Rep. 220; *Shea v. Wellington*, 163 Mass. 364; 40 N. E. Rep. 193.

the life of a boiler, differed as to the probable period that it could be used, with safety, and also upon the cause of the explosion, the court will not, as a matter of law, hold the defendant blameless, in not examining the boiler and ascertaining its exact condition, but, with such a state of facts, will submit the question of the defendant's negligence to the jury, as to whether or not the unsoundness of the boiler should, in the exercise of due care, have been ascertained by the defendant.¹

¹ *Lehigh Valley Coal Co. v. Kiszal*, 80 Fed. Rep. 470; 51 U. S. App. 265.

CHAPTER XXIV.

FAILURE TO TIMBER MINE.

- SECTION 478.** Under common law duty as to place.
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§ 478. Under common law duty as to place. — Under the absolute duty of the master, at common law, to provide the servant with a reasonably safe place in which to work,

regard being had to the character of the place and the nature of the work being done, it is the master's duty to furnish such a supply of props and timbers, irrespective of statutory provisions, that may be necessary to render the roof of his mine, where miners are employed to work, reasonably safe.¹ A servant not employed to timber the roof of a mine, is not bound to make careful inspections to ascertain if the roof is reasonably safe or not, but has a right to rely upon the assumption of a performance of this duty by the employer, and for an injury from a breach thereof, is entitled to recover damages.² But if the work of the injured employee was for the express purpose of making the place of work reasonably safe, then the rule as to a reasonably safe place, would not apply to him;³ nor would it apply, where the character of the work continuously changed the place,⁴ or where, from the obvious nature of the surroundings and the defect in the roof, the injured employee, as a reasonable man, careful of his own safety, would have observed the defective condition of the roof, and where he did observe it, but failed to make complaint.⁵

¹ *White Mines & Mining Remedies*, Sec. 468, p. 611 and cases cited. "Mining companies are obligated to observe not only the duties imposed by statute, but those which exist by virtue of common law." *Junction Mining Co. v. Ench*, 111 Ill. App. 346. See, also, *Wilson v. Alpine Coal Co.* (Ky. 1904), 81 S. W. Rep. 278; *Carter v. Baldwin*, 81 S. W. Rep. 204. A dark tunnel, leading to a mine shaft, is such a place a mine owner is required to keep reasonably safe. *Williams v. Belmont Coal & Coke Co.* (W. Va. 1904), 46 S. E. Rep. 808.

² *Montgomery Coal Co. v. Barringer*, 109 Ill. App. 185.

³ *Indiana Coal Co. v. Batey*, 71 N. E. Rep. 191.

⁴ *White Mines & Mining Remedies*, Secs. 449, 450, pp. 594, 596.

⁵ *Bunker Hill & Sullivan Mining & Concentrating Co. v. Jones*, 130 Fed. Rep. 813; *Roccia v. Black Diamond Coal Co.*, 121 Fed. Rep. 451; 57 C. C. A. 567. Where the plaintiff was injured by falling debris from the roof of a mine, near where he was blasting, if the evidence fails to show notice of a defective condition to the defendants' superintendant and of a necessity for props, or want of notice to the plaintiff, there can be no recovery. *East Jellico Coal Co. v. Golden*, 25 Ky. Law Rep. 2056; 79 S.

§ 479. **Where work is to make a dangerous place safe.** — The general rule, in respect to the duty of a master to provide his servant with a reasonably safe place in which to work, cannot be applied to a case where a servant, when injured, is engaged in performing such duty of the master, by making safe a place which has become dangerous during the progress of the work, or from the manner in which the work was done. In such case, the relation between the master and servant is changed and the servant assumes the risk incident to the dangerous condition of the place, as one of the hazards of the employment, if he knows of it, or should know of it, by the use of ordinary care and observation. And in an action for his injury, it is immaterial whether the place originally became dangerous through the negligence of the master or not.¹ But this rule preventing a recovery on the ground of assumed risk is held, in Utah, not to apply to a miner who was, at the time of his injury, making excavations to enable other workmen to place timbers in the mine,² nor is it held to apply, in Iowa, to a miner who was not himself engaged in the work of making a dangerous place safe,³

W. Rep. 291. Where the work an injured miner was engaged in, at the stope of a mine, was not such as to render the place unsafe, it is not proper to give an instruction that a master is not bound to prop the roof, or keep it safe, at a place changed by the work of the employee. *Highland Boy Gold Mining Co. v. Pouch*, 124 Fed. Rep. 148.

¹ *White Mines & Mining Remedies*, Sec. 449, p. 594; *Moon Anchor Consolidated Gold Mines v. Hopkins*, 111 Fed. Rep. 298; 49 C. C. A. 847. But if the master assures the servant the place is safe, the rule is otherwise. *Faulkner v. Mammoth Mining Co.* (Utah, 1901), 66 Pac. Rep. 799. If the employee, when injured, was engaged in taking out a coal pillar and there is no evidence that he called for props, he assumes the risk, in Iowa. *Olsen v. Maple Grove Coal & Mining Co.*, 87 N. W. Rep. 736. And for similar rule, in Missouri, see *Watson v. Coal & Coke Co.*, 52 Mo. App. 866.

² *Faulkner v. Mammoth Mining Co.*, 66 Pac. Rep. 799.

³ *Cushman v. Carbondale Fuel Co.*, 88 N. W. Rep. 817.

or to one who had no knowledge of the defects which made the place of work dangerous.¹

§ 480. **Distinction between mine already timbered and mine untimbered.** — A miner set to work in a room of a mine, already timbered, has a right to presume that his employer has properly performed his duty as to the timbering, and to proceed with his work, in reliance upon this presumption, unless a reasonably prudent and intelligent man, in the performance of his work, as a miner, would have learned facts, from which he must necessarily have apprehended danger to himself.² But a mine owner is not liable to an employee engaged in sinking a shaft, where the shaft has never been timbered, if he is a miner of experience and the injury results, after the master has advised him of the necessity of timbers, while he is engaged in timbering, when the cave-in occurs, as he is held to assume the risk of injury from the known condition under which he works.³ And the fact that mining operations, in a mine, have proceeded beyond a point, in the stope, to which it has been timbered, does not so change the portion timbered, into a place to work, as to bring it within the rule requiring the master to furnish a reasonably safe place to work, but he is only under the duty to furnish competent men and suitable materials for the use of his employees, working in such timbered portion.⁴

¹ *Wahlquist v. Maple Grove Coal & Mining Co.*, 89 N. W. Rep. 98. That the rule as to place, does not apply where the work is to make the place safe, or where it constantly changes the place, is held in the following cases: *Finlayson v. Utica Min. & Mill. Co.*, 67 Fed. Rep. 507; *Consolidated Coal & Min. Co. v. Floyd*, 51 Ohio St. 542; 38 N. E. Rep. 610; 25 L. R. A. 848; *Victor Coal Co. v. Muir*, 20 Col. 320; 38 Pac. Rep. 378; 26 L. R. A. 435; *Pittsburg & West. Coal Co. v. Estlevenard*, 52 Ohio St. 322; 40 N. E. Rep. 725.

² *Western Coal & Mining Co. v. Ingraham*, 70 Fed. Rep. 219; 36 U. S. App. 1; 17 C. C. 71; 2 Amer. & Eng. Corp. Cas. (N. S.), 689.

³ *Stiles v. Ritchie*, 8 Colo. App. 393; 46 Pac. Rep. 694.

⁴ *Petaja v. Aurora Iron Co.*, 106 Mich. 469; 64 N. W. Rep. 335; 66 N. W. Rep. 951; 32 L. R. A. 433, 438.

§ 481. **Duty to timber mine cannot be delegated.**—Like the other absolute duties of the mine owner, the duty as to a reasonably safe place, which he owes to his employees,¹ cannot be delegated by him to a fellow-servant of an injured employee, so as to avoid liability for an injury from a known defective place. This rule, which applies to all working places in the mine, where employees' duties so occupy their attention that they do not have time to look after their own surroundings, to see that the place of work is reasonably safe, requires the employer to furnish timbers, and, when necessary, to see that the roof of the mine is securely propped and secured, so as to prevent falling rocks and slabs and this duty cannot be delegated by the master to an employee, so that he can avoid liability for a failure to secure the roof,² as a duty imposed either by the common law or statute, upon an employer, cannot be delegated.³

§ 482. **Mine owner cannot place danger from breach of statute upon employee.**—In some Illinois cases, mine owners who had failed to comply with the provisions of the statute, as to props, attempted, by posted rules, to place the risk of injury for their own violation of the statutory obligation, upon their employees, but the courts refused to permit them to thus take advantage of their wrong and held that they could not thus avoid a compliance with the statute, on grounds of public policy.⁴ The attempted evasion of the statute was undertaken by rules, announcing the danger of the roofs of mines; that this was a risk incident to the business of mining; that the mine manager

¹ See chapter, *Duties of Mine Owner*.

² *Western Coal & Mining Co. v. Ingraham*, 70 Fed. Rep. 219; 36 U. S. App. 1; 17 C. C. A. 71; 2 Amer. & Eng. Cor. Cas. (N. S.) 689.

³ *Cherokee & P. Coal & Mining Co. v. Britton*, 3 Kan. App. 292; 45 Pac. Rep. 100.

⁴ *Consolidated Coal Co. v. Lundak*, 97 Ill. App. 109.

did not undertake the responsibility for the unsafe condition of the roofs but the miners must, themselves, see to the safety of the roofs and if they failed to do so, they assumed the risk of injury therefrom.¹ The rights of both the miners and the mine owner were considered with reference to the statutes of the State, placing the burden on the employer of providing timbers and props; the rule, in attempting to shift the responsibility of the employer for the neglect of his own timberman, was held against public policy and the contract of the employee, relieving the employer of the result of his own negligence, was held void, for the same reason.²

§ 483. **What constitutes breach of statute — Unsafe place.**— A failure to comply with the express provisions of a statute, requiring props and timbers for the roof of a mine, to make it reasonably safe, is generally held to be such a violation of the employer's duty, as will render him liable to a charge of negligence, in case of an injury, and any other construction of the statute would, manifestly, render it inoperative. Accordingly, where the general mine manager of a coal mine fails to do that which he knows to be necessary to support the roof of the mine, or an entry thereto, a jury will be justified in finding that the company has failed to use reasonable care and diligence to keep the roof and entries of the mine in a reasonably safe condition and a verdict for the plaintiff will not be set aside.³ And that there may have been props somewhere in the mine is not a compliance with the statute that they

¹ Consolidated Coal Co. v. Lundak, 196 Ill. 594; 63 N. E. Rep. 1079.

² Himrod Coal Co. v. Clark, 197 Ill. 514; 99 Ill. App. 832; 64 N. E. Rep. 282. The defendant cannot shift the duty of providing such a reasonably safe place as the statute requires, upon the mine employees and thus avoid the burden placed upon himself. Spring Valley Coal Co. v. Rowatt, 96 Ill. App. 248; 196 Ill. 156; 63 N. E. Rep. 649.

³ Coal Valley Mining Co. v. Haywood, 98 Ill. App. 258.

should be at the "usual place," particularly if a knowledge of the props has not been brought home to the miner needing such props.¹

§ 484. **Assumption of risk from failure to prop roof.** — Some respectable courts and text-writers favor the doctrine that a breach of statutory duty is assumed the same as any other open and obvious danger and in such jurisdictions, or where such doctrine obtains, if an employee in a mine should go to a place where the statute was known to be violated and the roof was not secured by props, he would waive the protection of the statute and assume the risk of injury.² But, because such a contention, by a mine owner, would not only enable him to take advantage of his own wrongful violation of the statute, but the general recognition of the doctrine would, in effect, nullify such statutes, on grounds of public policy the better opinion seems to be that a mere knowledge of a violation of the statute, will not relieve the employer, in case of injury. On this subject the Supreme Court of Missouri has used this language: "The next contention of the appellant is that knowledge, on the part of the plaintiff, that the statute had not been complied with, should defeat this action.

¹ *Donk Bros. Coal & Coke Co. v. Stroff*, 100 Ill. App. 576. The question of whether or not the timbers furnished made the roof reasonably safe is for the jury. *Hamilton v. Mendota Coal & Mining Co.* (Iowa, 1908), 94 N. W. Rep. 282; *Good Eye Mining Co. v. Robinson* (Kan. 1903), 78 Pac. Rep. 102.

² *Holmes v. Clark*, 6 Hurl. & N. 849; *DeYoung v. Irving*, 5 App. Div. (N. Y.) 499; *Kniseley v. Pratt*, 148 N. Y. 372; *Higgins Co. v. O'Keefe*, 79 Fed. Rep. 900; *Keenan v. Edison Co.*, 129 Mass. 379; 48 L. R. A. 68. *Dresser's Emp. Liab.*, Sec. 51, p. 249. Upon this subject, Mr. Dresser, in his recent work on *Emp. Liab.* says: "The true rule is believed to be that the servant, upon entering the employment, or afterwards, may expect that the master will comply with the statute; but if the master does not so comply, and the servant knows the breach and his rights under it, and appreciates the risks therefrom, he cannot recover in any case where it appears that he consented to the violation." Sec. 116, p.

Such a declaration of law would, in effect, nullify the statute. Knowledge only by the plaintiff, of the failure of defendant to have the mine provided with these protections, will not defeat the action. But we do not say, in this case, that plaintiff could recover, if guilty of negligence himself.”¹

§ 485. **Assumption of risk as to props, in Utah.** — A case quite similar to this was considered by the Supreme Court of Utah and a similar view of the law was announced in that State, with reference to an assumption of risk, from a dangerous known condition of the roof of a mine, to an experienced miner. An experienced miner, extracting coal under a contract at a fixed price per ton, agreed to do his own timbering. He was held guilty of such contributory negligence as would preclude a recovery and was held to assume the risk, where, on a day when work was not being carried on in the mine, he voluntarily and without any sudden emergency, sat down under a hanging wall, which he knew to be dangerous and liable to fall at any time.²

604. “It is not the duty of a miner employed to operate a drill in a mine to inspect the timbering or the condition of the rock above him, but he has the right to assume that the master has performed his duty in making the place where he is directed to work reasonably safe, and to proceed with his work in reliance on such assumption, unless a reasonably prudent and intelligent man, in the performance of his work, would have learned facts from which he would have apprehended danger to himself.” *Bunker Hill & Sullivan Mining & Concentrating Co. v. Jones* (U. S. C. C. A., Ore. 1904), 130 Fed. Rep. 818.

¹ *Durant v. Lexington Coal Co.*, 97 Mo., p. 66. See, also, *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156; 63 N. E. Rep. 649; *Donk Bros. Coal & Coke Co. v. Strloff*, 100 Ill. App. 576; *Himrod Coal Co. v. Clark*, 197 Ill. 514; 64 N. E. Rep. 282; *Green v. West. Amer. Co.*, 80 Wash. 87; 70 Pac. Rep. 310. A miner who has helped trim a roof and knows it is loose, assumes the risk of falling rock, in going under it, in Wisconsin. *Paul v. Florence Mining Co.*, 80 Wis. 350; 50 N. W. Rep. 189.

² *Fowler v. Pleasant Valley Coal Co.*, 16 Utah, 848; 52 Pac. Rep. 534.

§ 486. **Assumption of risk, under Washington statute.** The rule which is applied in Washington, is the same as that which obtains in Illinois, as to assumption of the risk from the breach of a statutory duty by a mine owner, in failing to furnish props, required by a statute of the State to be furnished to miners, for their use in supporting the roof from caving in and it is held that such a defense cannot prevail in that State, as to a breach of statutory duty.¹ Accordingly, in Washington, where the operator of a coal mine violated the provisions of a statute, requiring timbers to be furnished to the workmen, and a miner sustains injury by reason of the lack of timbers, which should have been furnished, it is held that the mine employer cannot plead assumption of risk, on the part of the miner, even though the injured miner knew of the violation of the statute by the employer.²

§ 487. **Promise to furnish props.**—Where the evidence tended to show that the shift boss of a mine, on being notified that certain timbers in a mine, where plaintiff was at work, were taking weight, not only promised to erect additional supports, but assured the plaintiff that it was perfectly safe for him to remain at work, it was held that such evidence justified an instruction that if the injured employee, relying upon such promise and assurance, continued to work, believing it safe for him to do so, he did not assume the risk of the roof falling upon him.³ But the mere fact of a promise or assurance will not exempt the employee from an assumption of the risk, if the defect and danger was apparant and obvious and he knew this fact. It is held, in Arkansas, that if the employee noted the falling of stone and the absence of props,

¹ See Section, *Statute of Illinois*.

² *Green v. Western American Co.*, 80 Wash. 87; 70 Pac. Rep. 310.

³ *Highland Boy Gold Mining Co. v. Pouch*, 124 Fed. Rep. 148.

although the foreman promised to furnish him timbers, this would not justify an instruction that he did not afterwards assume the risk of injury, as the plaintiff would not have been justified in exposing himself to danger so obvious and imminent, if a person of ordinary prudence would have refused to so expose himself, and the question of his contributory negligence in continuing work, after such promise, in the absence of props, depended upon a consideration of all the facts and circumstances in evidence.¹ And in Washington, where the evidence showed that the plaintiff was an experienced coal miner, who was especially employed to timber the mine and make it safe, and he had knowledge of the dangerous condition of the roof, he could not recover for an injury from falling stone, while so engaged.²

§ 488. **Contributory negligence—Failure to use props furnished.** —As it is generally held essential that a miner, injured by reason of a defective condition of the roof, establish that his injury was due to a breach of statutory duty, where such is the allegation of negligence relied upon, it is a good defense, on the part of the mine owner, to establish that he was not so injured, but that his injury was due to his own contributory negligence.³ Accordingly, it

¹ *Kansas & Texas Coal Co. v. Chandler*, 71 Ark. 518; 77 S.W. Rep. 912.

² *Roccia v. Black Diamond Coal Mining Co.*, 121 Fed. Rep. 451; 57 C. C. A. 567.

³ *Dresser Emp. Liab.*, Sec. 51, *et sub.*; *Spiva v. Osage Coal & Min. Co.*, 88 Mo. 68; *Adams v. Kansas & Texas Coal Co.*, 85 Mo. App. 492. But this is not the rule announced in Illinois. *Riverton Coal Co. v. Shepard*, 111 Ill. App. 294. See Chapter, *Statutes for Safety of Miners*. "Plaintiff and another were driving a heading in defendant's mine, and were charged with the duty of pulling down or timbering up loose rocks. After driving the heading several feet and timbering up one rock, they drove it a few feet past the timbering, thus partly uncovering another rock. Plaintiff was then ordered to cut off a corner several feet short of the last rock, and his fellow-worker continued to drive the heading, thus further uncovering the rock, and, while the plaintiff was passing under it

is held, in Arkansas, that if the injury to the miner is due, proximately, to his own or his fellow-servant's failure to use props that the master has furnished, or if the evidence is conflicting upon this point, it cannot be said, as a matter of law, that the injury to the employee was due to a failure on the part of the employer to furnish props,¹ and if the employee himself knocks out a prop and makes no effort to replace it, but continues his work with a knowledge of the fact, he cannot recover for a subsequent injury, due to a fall of slate at the place where the prop was displaced.² But in Illinois the failure of a mine owner to furnish props, as required by statute, is not excused by the contributory negligence of the miner injured as a result of such failure, and a miner who is injured as result of the employer's breach of statutory duty to furnish props may recover, notwithstanding his own contributory negligence, where the injury would not have occurred if the statute had been complied with.³

to get a sledge from his fellow-worker, it fell and injured him. *Held*, that it was as much plaintiff's duty as that of his fellow-worker to see that the rock was safe, and in failing to perform such duty he was guilty of such negligence as would preclude a recovery." *Pioneer Min. & Mfg. Co. v. Thomas* (Ala. 1902), 82 So. Rep. 15; 188 Ala. 279. "An instruction, in an action for injury to an employee in a coal mine through the falling of a stone from the roof of the room in which he worked, that, if he requested the foreman to furnish him props, and the foreman promised to furnish them, then, if plaintiff relied on the promise, and for that reason continued at his work, he did not assume the risk incident on the failure to furnish the props, is misleading, as plaintiff would not have been justified in exposing himself to danger so obvious and imminent that no person of ordinary prudence would, under like circumstances, have exposed himself to it; and the question of his negligence in continuing at work in the absence of props depends on a consideration of all the circumstances." *Kansas & T. Coal Co. v. Chandler* (Ark. 1903), 77 S. W. Rep. 912.

¹ *Kansas & Texas Coal Co. v. Chandler*, 71 Ark. 518; 77 S. W. R. p. 912.

² *Dickinson Coal Co. v. Peach*, 82 Ind. App. 83; 69 N. E. Rep. 189.

³ *Spring Valley Coal Co. v. Rowatt*, 96 Ill. App. 248; 196 Ill. 156; 63 N. E. Rep. 649; *Sunnyside Coal Co. v. Perry Center*, 100 Ill. App. 54; 6 Donk Bros. Coal & Coke Co. v. Stroff, 100 Ill. App. 576. If the master

§ 489. **Miner's contributory negligence, as viewed by U. S. Supreme Court.** — In a case where the death of an employee in a tunnel, resulted from an alleged neglect on the defendant's part, to securely prop or timber the roof of the tunnel, the duty of the defendant, under the California statute¹ and the question of the contributory negligence of the deceased, was considered by the United States Supreme Court, a few years since.² The deceased, with several other miners, was in the defendant's mine, and the superintendent, discovering that the roof of the tunnel had been shattered by blasting, told the men to prop it up and put a post by the side of the one which had been there for another purpose, but, on one of the men suggesting that this should be taken out and another one put in, in its place, left it optional with them to do so or not, and warned them against the falling of the roof. The deceased and his co-employees decided that it would be safe to take the post out, and did so, intending to go after other timber, and, after the removal of the post, deceased sat down under the shattered roof and part of the rock fell on him and killed him. It was held that he assumed the risk of injury from such causes as were apparent to him and that his own negligence was the direct cause of his death and that a verdict was properly directed for the defendant.³

§ 490. **The Colorado statute and constructions.** — The statute of Colorado makes it the duty of the mining boss to see that there is sufficient timber in the mine to be used

has concealed the condition of the roof, by hiding the absence of timbers, the servant cannot be held guilty of contributory negligence in working there, especially if he is inexperienced. *Swensen v. Bender*, 114 Fed. Rep. 1; 51 C. C. A. 627.

¹ California Civil Code, Sec. 877.

² 1891.

³ *Bunt v. Sierra Butte Gold Mining Company*, 138 U. S. 488; 34 L. Ed. 1031.

for props and the duty of any miner to securely prop the roof of any working place under his control.¹ Under this statute, a coal miner who continues to work within a few feet of a bad rock, which he knew ought to be propped, without propping it, or taking any steps to secure it, or giving any notice concerning it, is guilty of such contributory negligence as will bar his right to recover for injuries by the falling of the rock, whether the petition is based upon common law or statutory negligence on the part of the employer.²

§ 491. **The Illinois statute.**—The statute of Illinois³ requires that the mine owner or operator shall furnish a sufficient supply of props and cap pieces for the purpose of securing the roof of the mine and to deliver the same, when required. Neither contributory negligence or assumed risk is a good defense for a failure to comply with this statute; ⁴ a violation of the statute makes out a *prima facie* case of

¹ For statute and construction, see *Victor Coal Co. v. Muir*, 20 Colo. 820; 88 Pac. Rep. 378; 26 L. R. A. 435.

² *Victor Coal Co. v. Muir*, *supra*. In Colorado, for an injury to a miner as a result of an insecure stull falling upon him, which the pump man had promised to secure, he was held not to be guilty of contributory negligence. *Carleton Min. & Mill Co. v. Ryan*, 29 Colo. 401; 68 Pac. Rep. 279. The rule *volenti non fit injuria*, preventing an employee who consents or knows of a danger from recovering for a subsequent injury, does not apply to injuries from breach of statutory duty. *Boyd v. Brazil Block Coal Co.*, 50 N. E. Rep. 868; distinguishing *Victor Coal Co. v. Muir*, 20 Colo. 820; 26 L. R. A. 435; 88 Pac. Rep. 378.

³ Hurd's Rev. St. Ill. 1889, Ch. 98.

⁴ *Riverton Coal Co. v. Shepard*, 111 Ill. App. 294. "That there may have been props somewhere in the mine is not a substantial compliance with the statute that they were at the usual place, particularly when the miner knows nothing about them." *Donk Bros. Coal & Coke Co. v. Stroff*, 100 Ill. App. 576. "A mine owner owes to his servants who are required to pass along a roadway in the mine the legal duty to maintain the same in a reasonably safe condition." Judgment, 112 Ill. App. 452, affirmed. *Henrietta Coal Co. v. Campbell*, 71 N. E. Rep. 868; 211 Ill. 216.

negligence, in case of a resulting injury thereunder;¹ a conscious violation of the statute is held to be a willful violation, within the meaning of the law;² it is generally sufficient to allege that it was the defendant's duty to deliver props and cap pieces when required and it failed to perform this duty,³ and if the evidence fairly tends to support the allegation that the injured miner sent up a request for props, which were not furnished to him, as requested, and that he was subsequently injured, this establishes a case for the submission to the jury, as to the defendant's negligence, under the statute.⁴ But under the prop statute

¹ *Coal Co. v. Patting*, 71 N. E. Rep. 266.

² *Himrod Coal Co. v. Stevens*, 67 N. E. Rep. 889. But see, *Niantic Coal Co. v. Leonard*, 126 Ill. 216; *Beard v. Skelden*, 113 Ill. 584; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590, holding that the refusal must be intentional, or known.

³ *O'Fallon Coal Co. v. Laquet*, 198 Ill. 1258; 64 N. E. Rep. 767.

⁴ *Donk Bros. Coal & Coke Co. v. Struff*, 200 Ill. 498; 66 N. E. Rep. 29. Contributory negligence is not a defense for a failure to comply with the prop statute of Illinois. *Riverton Coal Co. v. Shepard*, 111 Ill. App. 294. The miner, under Illinois statute must order props and cap pieces of a certain dimension and where he does this, it is no compliance with the law for the employer to furnish timbers that have to be sawed or spliced. *Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 833; 61 N. E. Rep. 885. Contributory negligence, under Illinois statute, is held not to be a defense, in *Western Anthracite Coal & Coke Co. v. Beavers*, 192 Ill. 833; 61 N. E. Rep. 885; *Himrod Coal Co. v. Adeck*, 94 Ill. App. 1; *Odin Coal Co. v. Denman*, 84 Ill. App. 190; 57 N. E. Rep. 192. The Illinois statute, as to props, does not supersede the common law, or exempt the master from the common law duty of providing a reasonably safe place, independently of the statute. *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9; 54 N. E. Rep. 567. A declaration, under Illinois statute, is sufficient which states that props were required and requested and they were not furnished at the working place, as demanded by the statute. *Mt. Olive & S. Coal Co. v. Rademacher*, 190 Ill. 538; 60 N. E. Rep. 888. If a miner obeys an order of the timberman and is injured, he is held, in Illinois, to assume the risk, as the two are fellow-servants. *Kellyville Coal Co. v. Humble*, 87 Ill. App. 437. The mine owner cannot, by printed rules, shift the danger from a failure to furnish props, upon an employee, entitled to the protection of the statute. *Mt. Olive & S. Coal Co. v. Herbeck*, 92 Ill. App. 441; 60 N. E. Rep. 105. Knowledge by a timberman that coal had fallen at a place where props had been requested, was a sufficient show-

of Illinois, a petition merely avering a failure to furnish props and to timber the roof of the mine, without any additional allegation as to the necessity for props and a request therefor, is insufficient; ¹ the miners should themselves demand props, when they are needed, ² and not only should they demand timbers, but where the dimensions are particular for the work in which they are to be used, they should specify the dimensions needed, or they cannot complain of the dimensions of the timbers. ³ Where props of a certain dimension are demanded, however, it is not a compliance with the statute to send down props that it will be necessary to splice; ⁴ any workman in the mine is entitled to the provisions and protection of the statute ⁵ and a sufficient

ing of a "willful disregard" of the statute, in Illinois. *Kellyville Coal Co. v. Yehnka*, 94 Ill. App. 74. For list of instructions, approved by the higher court, for violation of statute of Illinois, see *Donk Bros. Coal & Coke Co. v. Peton*, 192 Ill. 41; 61 N. E. Rep. 380. A promise, by a mine owner, to repair a dangerous place, as soon as he could, will prevent an assumption of the risk, by his employee. *Westville Coal Co. v. Wood*, 96 Ill. App. 616. The fact that props furnished a coal miner were not of the exact length required for a place in his mine, will not make the mine owner liable for a resulting injury, unless the desired length was requested. *Sugar Creek Coal Mining Co. v. Peterson*, 177 Ill. 324; 52 N. E. Rep. 475, reversing 75 Ill. App. 681. One employed to pull down loose coal after a blast, is held to assume the condition of the roof, in Illinois, in *Muddy Valley Mining Co. v. Parish*, 74 Ill. App. 559. If the mine has been properly inspected three hours before an accident, there is no liability, if nothing showed any defects, as a defect not then discoverable could not have been discovered earlier. *Missouri & Illinois Coal Co. v. Schwab*, 74 Ill. App. 567. A mine owner is liable for an injury to an inexperienced boy miner, from the fall of the timber, insecurely placed. *McLean Co. Coal Co. v. McVey*, 88 Ill. App. 158.

¹ *Consolidated Coal Co. v. Young*, 24 Ill. App. 255.

² *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 619.

³ *Sugar Creek Mining Co. v. Peterson*, 177 Ill. 324; 52 N. E. Rep. 475; reversing 75 Ill. App. 681.

⁴ *Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 333; 61 N. E. Rep. 335; affirming 95 Ill. App. 95.

⁵ *Mt. Olive & S. Coal Co. v. Herbeck*, 190 Ill. 39; 60 N. E. Rep. 105; affirming 92 Ill. App. 441.

demand will be found to have been made for props, where the evidence showed that for three successive days, prior to his injury, a miner had, according to custom, written upon a slate, in the mine, a request for props, which he had never received.¹

§ 492. **Indiana statute and constructions.**—The law of Indiana² requires the employment of a “mining boss” to visit and examine every working place in the mine every alternate day and see that it is properly secured by props and that safety in all respects is assured and that all loose coal, where miners have to travel, is secured. Under this statute it is held that the mine owner is not an absolute insurer of the safety of his men, but the act only operates to render a violation of its provisions actionable negligence.³ It is held that an employee put to work in a room of the mine has a right to assume that it has been made reasonably safe, by the employer;⁴ the failure of the employer to perform the duties imposed upon him by statute is held to be negligence *per se*,⁵ and a complaint is held sufficient under the statute, which charges that the employer failed to employ a competent boss and he failed to have the mine examined and the props furnished and failed to properly secure the working places, as required to do by the statute.⁶ It is held in Indiana that

¹ Donk Bros. Coal & Coke Co. v. Peton, 192 Ill. 41; 61 N. E. Rep. 830; affirming 95 Ill. App. 198.

² Horner's Rev. St. 1897, Sec. 5480m; Burns' Rev. St. 1894, Sec. 7472.

³ Wooley Coal Co. v. Bracken, 30 Ind App. 624; 66 N. E. Rep. 775.

⁴ Diamond Block Coal Co. v. Cuthbertson, 67 N. E. Rep. 558.

⁵ Diamond Block Coal Co. v. Cuthbertson, *supra*.

⁶ *Ante, idem.* See, also, Chapter, *Pleading Actions for Mining Injuries*. In pleading an action for violation of the Indiana statute it is not necessary to counter on assumption of risk, by denying a knowledge of the violation of the law. Davis Coal Co. v. Pollard, 62 N. E. Rep. 492. By employing a mine boss, as required by Ind. Rev. Stat. 1894, Secs.

the owner of a coal mine is not liable for an injury to an employee caused by a fall of top coal from the roof of the mine, at a place where he was at work, where he was an experienced miner and had thoroughly tested the roof a short time before the fall and believed it to be perfectly safe, notwithstanding the statute¹ making it the duty of the mining boss to examine every working place as often as every alternate day, and to see that the same is properly secured by props and timbers and that safety in all respects is assured.² Under Burns' Revised Statutes

7472, 7473, the owner does not relieve himself from the effect of such boss' negligence. *Linton Coal Mining v. Persons*, 39 N. E. Rep. 214. The fact that the statute of Indiana provides for a penalty for its violation, does not affect the injured miner's right to also sue for damages. *Davis Coal Mining Co. v. Polland*, 62 N. E. Rep. 492. Failure to provide props, as required by Ind. Act, March 6, 1885, is an act of negligence *per se*. *Hochstetler v. Morier Coal & Mining Co.*, 35 N. E. Rep. 927.

¹ Rev. Stat. Ind. 1894, Sec. 7472.

² *Island Coal Co. v. Greenwood*, 151 Ind. 476; 50 N. E. Rep. 36; 4 Amer. Neg. Rep. 146, citing *Finlayson v. Utica Mining and Milling Co.*, 67 Fed. R-p. 507; 32 U. S. App. 143; 14 C. C. A. 492. "In an action under Burns' Rev. St. 1901, §§ 7447, 7466, 7472, 7473 (Horner's Rev. St. 1901, §§ 5472a, 5480g 5480m, 5480n), making mine owners liable for injuries occasioned by failure to provide sufficient props and for failure to keep the working places secure by props, there was a general verdict for plaintiff and also special findings that plaintiff was an experienced miner; that slate from the roof fell upon him while he was working at the face of a coal vein; that slate is liable to fall at any time; that the falling of the slate, if not propped, is an inherent danger of coal mining; that the plaintiff had knowledge of such danger; that he knew the roof of the room in which he was working was composed largely of slate; that he knew large quantities of slate had been falling almost daily; that it is not difficult to tell whether slate is in the roof of a mine; that plaintiff examined the slate that fell on him a few minutes before it fell, and believed it to be safe; that defendant's bank boss could not have made any other test than plaintiff made; that the driver delivered props at plaintiff's room three days before the accident; and that slate can be safely propped. Held, that the special findings were not sufficient to impeach the finding in the general verdict that defendant had failed to perform his statutory duties." *D. H. Davis Coal Co. v. Polland*, (Ind. 1902), 62 N. E. Rep. 492.

1894 of Indiana, Section 7472, requiring an inspection every alternate day, by the mining boss, to see that all airways are safe and no props are required, in order to insure the safety of the miners, an allegation that the mining boss appointed by the mine owner, failed to inspect the mine as required by the statute, and without the knowledge of the plaintiff, a miner at work in said mine, the walls of the drift between where the coal was mined became so thin that a shot blew one of the walls down upon the plaintiff, is held to be a good cause of action.¹

§ 493. **Reasonable care the test in Indian Territory.** The common law rule, as to reasonable care by the employer to maintain a reasonably safe place for his employees to work, is the test applied in the Indian Territory, in an action for an injury to an employee in a coal mine, from a failure to properly timber or secure the roof of his mine.² In an action for an injury to the plaintiff, while employed in the defendant's mine, by the falling of its roof, evidence that the roof was supported by a post; that such support was ordinarily sufficient for the purpose and made a reasonably safe place for the miners to work; that it was such as was usually employed in well regulated mines and that it was impossible to guard against such accidents, which were among the ordinary and usual risks of the business of mining, was held to be sufficient to disprove the charge of negligence on the part of the defendant, that it had negligently failed and refused to timber and secure that portion of the mine where the injury occurred.³

§ 494. **The statute of Iowa.** — Under the statute of Iowa,⁴ the miner failing to prop the section of the mine

¹ *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 1; 61 N. E. Rep. 236.

² *Choctaw, Oklahoma & Gulf Co. v. Nicholas*, 53 S. W. Rep. 475.

³ *Ante. idem.*

⁴ *McLain's Iowa Code*, Secs. 2463, 2465.

that needs props is made guilty of a misdemeanor and the owner is required to send down, for the use of the miners, all such props, when required. In a recent case, which originated under this statute, it was held that the law did not apply to a miner engaged in sloping an entry of a coal mine, used to bring the coal to the surface, where such miner was not in control of the entry, as it was not his duty to keep the place of work in repair, as an incident to his duty as a workman, but the place of work, so far as he was concerned, was completed, when his work began.¹ It is held, under this statute, that the miner must demand props, as a condition precedent to a liability on the part of the owner, for a failure to furnish the same.²

§ 495. **The Kentucky statute and construction.** — The statute of Kentucky, as to props and timbers in mines,³ makes it a misdemeanor for any person employed in a mine to intentionally or willfully refuse or fail to securely prop the roof of a working place, under his control, or to refuse a compliance with the order of the superintendent to prop or secure such roof. It is held, under this statute, that the duty to prop the roof applies to workmen whose labor affects the timbering and that all such, when ordered to do so, must prop or secure the roof, made

¹ *Carson v. Coal Hill Coal Co.*, 101 Iowa, 224; 70 N. W. Rep. 185. A laborer at work in the entry to a coal mine, in Illinois, is held to be within the provisions of the statute of that State. *Mt. Olive & S. Coal Co. v. Herbeck*, 190 Ill. 89; 60 N. E. Rep. 105; affirming, 92 Ill. App. 441.

² *Oleson v. Maple Grove Coal Co.*, 115 Iowa, 74; 87 N. W. Rep. 786. Where the evidence is conflicting as to whether or not a miner is engaged in making a dangerous place safe, or working at a place the employer should make safe, the issue is for the jury. *Taylor v. Star Coal Co.*, 81 N. W. Rep. 249. The fact that rock had fallen on several previous occasions, at the place where the miner was injured, is sufficient to charge an employer with notice of a necessity for timbers, in Iowa. *Cushman v. Carbondale Fuel Co.*, 88 N. W. Rep. 817.

³ Stat. Ky. Sec. 2732.

dangerous by their work of excavation. It is held not to apply to a track layer, whose duty is to tend to the track of the mine owner and not look after the roof, and a failure to secure the roof, on his part, is not such contributory negligence as will prevent a recovery, in case of an injury from a failure to furnish or use props or timbers to retain the roof.¹

§ 496. **Miner assumes risk in Michigan.**—The right of an experienced miner to recover for an injury from a failure to prop or timber the roof of a mine, at a place where he was at work, has been considered by the Supreme Court of Michigan, and he is held to assume the risk, if he has knowledge of the dangerous condition of the roof. “A miner who knows that overhanging walls in a mine are liable to crack, if left for any length of time without protection, and that the wall, in a place where he is required to work, has been left from the previous day, without sufficient protection, assumes the risk of working in such place, without a promise, by the owner of the mine, to put it in a safe condition.”²

¹ *Ashland Coal, Iron &c. Co. v. Wallace*, 101 Ky. 626; 43 S. W. Rep. 207; 42 S. W. Rep. 744, citing *Bunt v. Sierra Butte Gold Mining Co.* 138 U. S. 483; 34 L. Ed. 1081. In Kentucky, a miner will not be held to assume the risk of injury from falling roof, after notice of necessity for props, where the boss has promised to furnish props. *Breckenridge Co. v. Hicks*, 22 S. W. Rep. 554; 15 Ky. L. R. 148. The failure of a coal company to discover rotten and defective timbers, as a result of which an employee is injured, is not such negligence as to render it liable, where the outward appearance of the timbers was solid. *Reinder v. Black & P. Coal Co.*, 12 Ky. L. R. 30; 18 S. W. Rep. 719.

² *Andrews v. Tamarack Mining Co.*, 114 Mich. 375; 72 N. W. Rep. 242. And see, for leading case, upon rule that owner does not owe it to employee to timber, where work has progressed a short distance beyond timbering, as this does not bring the untimbered portion within the rule requiring a reasonably safe place. *Petaja v. Aurora Iron Mining Co.*, 106 Mich. 470; 66 N. W. Rep. 951; 32 L. R. A. 335, 338.

§ 497. **The Missouri statute.** — The prop statute of Missouri,¹ requires “ The owner, agent or operator of any mine ” to “ keep a sufficient supply of timber, when required to be used as props, so that the workmen may, at all times, be able to properly secure the said workings from caving in; and it shall be the duty of the owner, agent or operator to send down all such props, when required.” Prior to the year 1887, this section was a portion of a chapter, relating to the “ health and safety of persons employed in *coal mines*” and in the year named the act was repealed and the title changed to “ an act to provide for the health and safety of persons employed in mines,” the word “ coal ” being omitted in the new statute. For many years, on account of the language of the enacting clause of this section, as originally passed, lawyers of the

¹ Sess. Laws, Missouri, 1887, p. 224; R. S. 1889, Sec. 7076; R. S. 1899, Sec. 8822. “ Under Rev. St., § 8822, providing that the owner or operator of a mine shall keep sufficient props, so that the workmen may at all times be able to secure ‘ said workings from caving in, and send down all such props when required,’ the word ‘ required ’ means ‘ needed ; ’ and it is the duty of such owner or operator, through his foreman, to know when such props are needed, and to then supply them, without waiting for request by the workmen.” *Bowerman v. Lackawanna Min. Co.*, 81 S. W. Rep. 1062. But see, contra, *Wajlack v. K. & T. Coal Co.*, 87 S. W. Rep. 506. “ Rev. St. 1899, § 8820, provides that, in case of loss of life by reason of a failure to comply with the statute on mining, a right of action shall accrue to any person who was dependent on the person killed. *Held*, that where in an action for the death of plaintiff’s son, owing to the failure of defendant mining company to supply proper timbering for use in the mine as required by section 8822, it appeared that other children supported plaintiff after the death of deceased, such fact would not deprive her of her right to recover; deceased having been her support at the time of his death. Rev. St. 1899, § 8822, requiring the owner of a mine to keep a sufficient supply of timber, when required to be used as props so that the workmen may at all times be able to properly secure the workings from caving in, is not satisfied by furnishing what may be deemed ordinarily sufficient timber; and the term ‘ properly secure ’ does not mean reasonably safe or absolutely safe, but such security as a reasonable person would afford, commensurate with the threatened danger.” *McDaniel v. Royle Min. Co.* (Mo. 1905), 85 S. W. Rep. 679.

lead and zinc region of Missouri, contended that this statute did not apply to lead and zinc mines, but only applied to coal mines. However, the Supreme Court held the statute constitutional because it did apply to all mines and mining in the State,¹ and since this holding this has been the accepted application of the statute. The act of 1887 made the owner liable only for a "willful violation" of the statute,² and under the statute before the revision, it was held essential to establish a request and refusal, on the part of the owner for props in order to show an intentional violation of the statute, from which the courts would be warranted in holding such breach a "willful" violation.³ Since the revision, the appellate courts of the State have several times construed the statute and the word "required" appearing therein, in the sense of "needed," holding the master liable for a failure to furnish props, when "needed," although not "requested,"⁴ the latest decision going to the extent of holding that a necessity for props, is proven to exist, within the statutory meaning, on proof of a cave-in and a failure to furnish them, as required by the statute,⁵

¹ *Hammon v. Central Coal & Coke Co.*, 156 Mo. 232. In this case, a request for props was established and the case held for the jury.

² Laws 1887, p. 228.

³ *Leslie v. Rich Hill Coal Mining Co.*, 110 Mo. 31; 19 S. W. Rep. 308. Knowledge of the owner of a necessity for props, was here held essential to a recovery.

⁴ *Adams v. Kansas & Texas Coal Co.*, 85 Mo. App. 492; *Bowerman v. Lackawana Mining Co.*, 98 Mo. App. 308; 71 S. W. Rep. 1062.

⁵ *McDaniel v. Royle Mining Co.*, 85 S. W. Rep. 676. For contrary holding, see *Mountain Copper Co. v. Van Buren*, 123 Fed. Rep. 61. For a defective petition, under this statute, as construed in the Federal courts for the Western District of Missouri, see *Coyle v. Mayne*, 122 Fed. Rep. 887, discussed in Chapter, *Pleading Actions for Mining Injuries*. An experienced miner who elects to draw the pillars in a coal mine for extra pay, without propping up the roof, assumes the risk of injury by such a method. *Watson v. Kansas & Texas Coal Co.*, 52 Mo. App. 366. Where mining has progressed far enough to suggest the necessity for

but this construction is not followed by the Supreme Court of the State.¹

§ 498. **Pleading injury from, in Montana.** — In a recent case, the Supreme Court of Montana passed upon the right of a plaintiff to recover and upon the sufficiency of a petition, for an injury from a failure to furnish props. It was alleged in the petition that the plaintiff was in the employment of the defendant and that he was injured by the fall of rock from the roof of its mine and that defendant failed to furnish a reasonably safe place for the plaintiff to work and negligently allowed the roof of the mine to remain in an unsafe and dangerous condition and failed to properly brace or timber the roof, which was liable to cave-in, at

props and the miner requests them and they are refused, this makes a case, under the Missouri statute. *Adams v. Kansas & Texas Coal Co.*, 85 Mo. App. 486. A petition, under the Missouri statute, need not deny notice of the violation of the statute, on the plaintiff's part, since matters of defense must be pleaded in the answer. *Adams v. Kansas & Texas Coal Co.*, 85 Mo. App. 486; *Fisher v. Central Lead Co.*, 156 Mo. 479; 56 S. W. Rep. 1107. Where the evidence as to whether or not an employee in defendant's mine was furnished with props a sufficient time before the accident for him to have used the same, is conflicting, the question is for the jury. *Hamman v. Central Coal & Coke Co.*, 156 Mo. 282; 56 S. W. Rep. 1091. Whether or not an experienced miner assumed the risk by continuing work, after knowledge that props were not furnished, is for the jury. *Hamman v. Central Coal & Coke Co.*, 156 Mo. 282; 56 S. W. Rep. 1091; *Smith v. Coal Co.*, 75 Mo. App. 177; *Hamilton v. Coal Co.*, 108 Mo. 364; 18 S. W. Rep. 977.

¹ "Where, in an action for injuries to a miner, there was no evidence of any demand by plaintiff on defendant to furnish props prior to the morning of the day of the accident, and plaintiff testified that he had never experienced any shortage of props, except on the very day of the accident, it was error to authorize the jury to find that prior to that day plaintiff had called on defendant for props, and defendant had failed to furnish them. Where plaintiff did not complain of defendant's failure to furnish props for the roof of a mine prior to the day plaintiff was injured, evidence that there was a general shortage of props, and that other miners had failed to get them when they called for them prior to the day of the accident, was incompetent." *Wajtylak v. Kansas & Texas Coal Co.* (Mo. Sup. Ct. 1905), 87 S. W. R. p. 506.

any time, if not so braced and timbered. The evidence showed, upon the trial, that the roof of the mine was in an unsafe and dangerous condition, but the fall of rock, at the time when the plaintiff was injured, was due to the act of an engineer, in removing a small portion of the slate to make a hole to affix a sight in. The court held that it was error to limit the plaintiff's right of recovery to a fall of the roof from its own weight, but held the facts entitled him to a submission of the case to the jury.¹

§ 499. **The New York statute and its interpretation.** — By the statute of New York,² it is made the duty of mine owners to properly timber the roofs and sides of each working place and not to permit any person to work in an unsafe place, or under dangerous material, except to make the place secure. Where a miner was killed, by reason of the fall of a pillar of talc, while he was at work in the defendant's mine and the evidence showed that the mine owner's superintendent had notice of the dangerous condition of the pillar and had provided props to use to secure the same but had failed to utilize them, at the time of the accident, and that the sliding of the pillar resulted from the water seeping through the soft layers of the pillar, the evidence was held to show a liability of the mine owner, under this statute.³

¹ *Freeman v. Sand Coulee Coal Co.*, 64 Pac. Rep. 347. "An employee engaged in blasting and pushing a tunnel in a mine, does not assume the risk of his employer's failure to keep the completed portion of the tunnel in a reasonably safe condition." *Kelly v. 4th of July Mining Co.*, 16 Mont. 484; 41 Pac. Rep. 278. In Montana, where an employee knew that the "lagging" under a ledge of rock, that he was required to work under, was knocked away by blasts, he assumed the risk of going under it, without adjusting the lagging. *Cummings v. Helena Smelting & Reduction Co.*, 26 Mont. 484; 68 Pac. Rep. 852.

² Laws 1897, Chap. 415, Sec. 122.

³ *Tetherton v. United States Talc Co.*, 165 N. Y. 665; 59 N. E. Rep. 1131. In New York, where a miner was killed by the fall of a pillar of

§ 500. Under Ohio statute — Reasonable care the test. — The Ohio statute,¹ with reference to props, makes it the duty of the mine owner or operator, of every coal mine, “to keep a sufficient supply of timber constantly on hand” and to deliver the same to the working place of the miner, and it further provides that no miner shall be held responsible for any accident which may occur in the mine, where the provisions of the statute are not complied with. As this statute is silent as to the existence of a necessity for props and, unlike many others, does not make it a condition precedent to a right of action, that props should have been requested by the miner,² it is held that the test as to the degree of care used, or a compliance with the statute, is to be determined, in each case, according to the principles of the common law.³ By the terms of the prop statute of Ohio,⁴ however, the miner is made guilty of a crime for not using timbers that the owner has furnished, and the owner is required to keep a supply of timber constantly on hand, and to deliver the same at the working place of the miners, and the criminal liability of the miner

talc, that he was engaged in removing, and defendant's superintendent had notice of the necessity of props and they had been furnished but not used, the defendant was held liable. *Tetherton v. U. S. Talc Co.*, 165 N. Y. 665; 59 N. E. Rep. 1131.

¹ Rev. St. Ohio, 1892, Sec. 6871.

² See R. S. Mo. 1899, Sec. 8822.

³ *Cecil v. American Sheet Steel Co.*, 129 Fed. Rep. 542. A miner who props the roof until he thinks it is safe, cannot afterwards hold the employer for an injury from falling rock, caused by insufficient timbering. *Pittsburg & West. Coal Co. v. Estlevenard*, 52 Ohio St. 32; 40 N. E. Rep. 725. Under the Ohio statute, where the alleged defect is a faulty pillar cap, which permitted a large rock to fall upon the miner, it is a jury question whether or not this was the approximate cause of the injury. *Cecil v. American Sheet Steel Co.*, 129 Fed. Rep. 542. The duty imposed upon a miner by statute to prop the roof of the mine cannot be shifted by a custom. *Con. Coal & Min. Co. v. Floyd*, 51 Ohio St. 542; 38 N. E. Rep. 610; 28 L. R. A. 848.

⁴ Revised Statutes, Ohio, Sec. 6571, originally Act April, 1872.

is conditioned upon the compliance with his full duty, by the mine owner. The Supreme Court of the State holds that a liability on the part of the mine owner results from a mere showing that the necessary timbers were not delivered at the working places, as required by the statute, and no request or notice, on the part of the miner, of the necessity for props, is required as a condition to hold the owner liable for a violation of the statute.¹

§ 501. **The Pennsylvania statute and constructions.**—The statute of Pennsylvania requires the owner of every mine in the State to employ a competent inside overseer, who has the exclusive management and control of the mine, and the owner, if he discovers any defect or danger, is required to report or give notice to such overseer.² Under this act, the mine owner discharges his full duty, when he employs a competent inside overseer and is not liable for accidents or injuries traceable to his carelessness or negligence.³ A miner who discovers serious defects in the mine and gives notice to his mining boss, if he fails to correct them, is bound to give notice to the owner, as the boss is a fellow-servant with such employee; and if the miner fails to do this, he continues the work at his own risk.⁴ But a workman who sees an apparently safe place, with new timbers just put in, and knows that, under the eye of the employer, an experienced workman has just completed the work, is not required to himself enter upon an inspection of the place, between the timbers, to determine if the workman has properly performed his duty, or left loose

¹ Pittsburg & Western Coal Co. v. Estievenard, 53 Ohio St. 43; 40 N. E. Rep. 725.

² Pa. Act, June 30, 1885, Art. 12, r. 24.

³ Lineoski v. Susquehanna Coal Co., 157 Pa. 153; 27 Atl. Rep. 577; 33 W. N. C. 204; Christner v. Cumberland & E. L. Coal Co., 146 Pa. 67; 23 Atl. Rep. 221.

⁴ Lineoski v. Susquehanna Coal Co., *supra*.

material liable to fall upon him, but is justified, in accordance with an order to work there, to assume that the place is reasonably safe.¹

§ 502. **The statute of Tennessee.** — The “prop statute” of Tennessee² requires the mine owner to employ a competent overseer, who shall see personally that all loose coal, slate or rock overhead is carefully secured against falling and requires the miner having charge of a working place, to keep the roof securely propped. Contributory negligence is held to be a defense under this statute, the same as in Missouri,³ and, irrespective of whether it was the duty of a miner to keep the roof of an entry room or neck propped, it is held that there can be no liability under the statute if the evidence shows no negligence of the overseer in failing to examine the roof and furnish props, but the injured miner, at the time of his injury, had worked for a day in undermining the supporting structure to the roof, without calling the attention of the overseer thereto, as he was entitled to do.⁴

§ 503. **Absence of props assumed by experienced miner, in Virginia.** — Practically the same rule, with reference to the assumption of risk, from the known failure of the mine employer to secure the roof of a mine, that is applied in Michigan, is announced in Virginia, with reference to a miner of experience. “A miner who knows that a piece of slate in the roof of a room in which he is at work, is loose, and notifies the mine boss, who directs him

¹ *Vanesse v. Catsburg Coal Co.*, 159 Pa. 403; 28 Atl. Rep. 200; 25 Pitts. L. J. N. S. 40; 83 W. N. C. 387. Where timbers are rotten or decayed, and as a result they fall and injure a miner, the employer is responsible, under the Pennsylvania law. *Webster v. Monongahela River Con. Coal & Coke Co.*, 201 Pa. 278; 50 Atl. Rep. 964.

² Acts Tenn. 1881, Chap. 170.

³ See Section *The Missouri Statute*.

⁴ *Heald v. Wallace*, 71 S. W. Rep. 80.

to prop it, which he promises to do, but fails to thus carry out the instructions given him, for his own and his fellow-servant's protection, cannot recover for an injury sustained by its fall, as he enters the room, after a blast, because of the assumption of risk."¹

§ 504. **Employment of mine-boss relieves employer in West Virginia.** — The statute of West Virginia requires every mine owner or operator in the State, to employ a competent mine boss,² who shall have charge of the underground operation of the employer's mine. The employment of a competent mine boss, as required by the statute, is held, by the courts of West Virginia, to be a compliance with the statute, sufficient to discharge the employer from liability under the statute, as he is not liable for any subsequent negligence of the mine boss, employed in pursuance to the requirements of the statute.³ In this State it is held that a miner cannot base an action for an injury from falling slate, upon a failure to furnish props, where the fall of the slate was caused by the employee tapping the slate, as he was under duty to do, to ascertain if it was safe, before propping, as this was an injury assumed by him, incident to his duties as an employee.⁴ But a mine owner is responsible for an injury to a miner, from a fall of rock from the roof of the mine, if, by reasonable care, the owner could have discovered the unsafe condition of the roof, where the injured employee is free from contributory negligence.⁵

¹ *Russell Creek Coal Co. v. Wells*, 96 Va. 416; 31 S. E. Rep. 614; 4 Va. Law Reg. 597.

² *West Virginia Code*, 1891, Append., p. 995, Sec. 11.

³ *Williams v. Thacker Coal & C. Co.*, 44 W. Va. 599; 30 S. E. Rep. 107; 40 L. R. A. 812.

⁴ *Massie v. Peel Splint Coal Co.*, 41 W. Va. 620; 24 S. E. Rep. 644.

⁵ *Davis v. Nottlesburg Coal & Coke Co.*, 84 W. Va. 500; 12 S. E. Rep. 539.

CHAPTER XXV.

INJURIES TO INFANTS IN MINES.

- SECTION** 505. Infancy as affecting master's obligation.
506. Infant falsely representing himself of age.
507. Employment in violation of parent's instruction.
508. Unlawful employment of child in mine — Illinois statute.
509. Damages for death of infant child.
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518. Responsibility for accidents to infants.
519. Contributory negligence of infants.
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521. Infant trespasser burned in ash pile.
522. Appointment of guardian to bring suit for.

§ 505. Infancy as affecting master's obligation. — An infant frequently is more experienced and capable of understanding and appreciating the dangers and risks of his employment, than a less experienced man of older years and the fact of infancy itself, unless the age of the injured employee is such that he could not have understood the nature of the risks incurred or appreciated the result of his negligent acts, will not exempt an employee under majority from the effects of his own acts or an understanding of the dangers with which he comes in contact. The fact of infancy, therefore, is only material as affecting the duty of the employer, to warn or instruct the infant, when by his

youth or experience he is not familiar or capable of thoroughly understanding the risks of his employment, and if he has such information, or himself causes the injury, by his own neglect, his position is not essentially different than that of an adult in the same employment.¹ In other words, the rule that an employee takes upon himself all the risks incident to the employment, is modified, in the employment of infants, to the extent of requiring the employer of an infant, to explain to him fully the hazards and dangers connected with the business and to instruct him how to avoid them,² but further than this the same obligation obtains toward an infant employee that exists toward an adult.

§ 506. **Infant falsely representing himself of age.** — A minor, who, to obtain employment in a hazardous business, where he knows of a rule preventing the employment of infants, falsely represents that he is of age, is held to be judged, in law, by the same rules of negligence as would apply to an adult employee and this is especially true, if his age and appearance would indicate that he had reached his majority, for in such case, he would be responsible for the employment, brought about by his own fraud, and the employer would not be charged with the same care and caution that would pertain to a contract of employment

¹ "The mere fact of minority does not, in and of itself, necessarily impose upon an employer any other or greater degree of care, in respect of the minor employee, than if the latter had attained full age." *Alabama M. R. Co. v. Marcus*, 115 Ala. 389; 22 So. Rep. 135. "Though the plaintiff was but 19 years of age, yet, as he was an experienced miner, he assumed such risks as were usually incident to his employment and such other risks, if any, as were glaringly presented to him of his *experience as a miner*." *Carter v. Baldwin*, 107 Mo. App. p. 229; 81 S. W. Rep. 204. An infant, old enough to understand the danger of the work undertaken, assumes the risk of injury, the same as an adult. *Dunn v. McNamee*, 59 N. J. L. 498; 37 Atl. Rep. 61.

² *Smith v. Irwin*, 51 N. J. L. (22 Vroom.) 507; 18 Atl. Rep. 852.

with a minor, known to be such, when employed.¹ A minor, however, who, in his application for employment, falsely answers that he is of age, and by such misrepresentation secures employment in a hazardous business, is not, for this reason alone, to be treated as a mere trespasser, while so employed, nor will he thereby forfeit his right to the same protection as other employees while actually engaged in the company's service, but the master is simply held to the same degree of care and no more that would obtain toward him, were he of the age that he falsely represented himself to be, when employed.²

§ 507. **Employment in violation of parent's instruction.** — The parent of a minor child, at common law was so far regarded as the owner of the child's services, during the period of minority, or before emancipation, that if an injury occurred to the child, during its minority, the parent could recover for the loss of service until it reached its majority.³ If an employer engages the services of a minor in a dangerous employment and the minor, in the course of his service, is injured in such employment, the master will be liable in damages without proof of other act of negligence than the employment of the child in the forbidden service, unless it could be shown that the child was injured as a result of his own willful act.⁴ But, in the

¹ *Lake Shore and M. S. Co. v. Baldwin*, 10 O. C. D. 833; *Brown v. Railroad*, 68 N. H. 518.

² *Marbury Co. v. Westbrook*, 121 Ala. 179; *Lake Shore & M. S. Co. v. Baldwin*, 10 O. C. D. 833.

³ *Texas & Pac. Co. v. Brick*, 18 S. W. Rep. 947; *Parsons v. Missouri-Pacific Company*, 94 Mo. 287. Where the miner was employed in violation of the parent's instruction, the defendant, in case of injury to the minor, is liable to the parent for loss of service to the minor, regardless of the contributory negligence of the minor or the act of his fellow-servants. *T. P. Co. v. Brick*, *supra*.

⁴ *Coleman v. Himmerberger-Harrison Land & Co.* (Mo. App. 1904), 79 S. W. Rep. 981.

absence of a statute creating a different standard of responsibility for the death or injury to a minor child, the jury should only consider the benefits that the parent would receive from the life of the child during its minority and not during the whole course of its probable existence.¹ And if the parent has consented to the employment of his child in a hazardous business, he assumes all the risks reasonably incident thereto, including that of the son's indiscretion and rashness due to his youth, and he cannot recover for loss of his service, where he was killed while discharging a dangerous duty, where there was a perfectly safe way to do it.²

§ 508. **Unlawful employment of child in mine — Illinois statute.** — On account of the hazardous nature of mining operations and the many sudden perils, where the best judgment of adults of experience is often needed to avoid injury to those engaged, legislation should be passed in all the States prohibiting the employment of children in mines, of such a tender age as to render them unable to avoid the dangers of the undertaking, by reason of their lack of appreciation of the dangers surrounding them. In Illinois the statute prevents the employment of such children in mines³ and where the statute is violated and a child is employed in the department of the service interdicted by the law, the employer is held liable for any injury that may result to the child as a result of the operation of the mine, while it is so engaged.⁴ A similar construction is adopted,

¹ *Parsons v. Missouri Pacific Company*, 94 Mo. 287.

² *McCool v. Lucas Coal Co.*, 30 W. N. C. 251; 24 Atl. Rep. 350. If the parent is familiar with the duties his son is expected to perform and hires him out to do such work, the master has a right to expect that the father has given the son due warning and instruction as to the proper way to perform such duties. *East & W. R. Co. v. Sims*, 80 Ga. 807; 6 S. E. Rep. 595.

³ See Illinois Mining Act, Sec. 22.

⁴ *Marquette Third Vein Co. v. Dielle*, 110 Ill. App. 684.

in Minnesota, under the statute of that State, preventing the employment of children between 14 and 16 years in or about dangerous machinery, and the injury to a child, so employed, under the statute, is held to establish a *prima-facie* case of negligence against the employer.¹

§ 509. **Damages for death of an infant child.** — Under the English statute providing for the survival of actions for death, through negligence,² from which most of the statutes of the different States are modeled,³ the action was given to the wife, parent or child. The parties competent to sue for the death of an infant child, depends wholly upon the provisions of the statute of the State where the death of the infant occurred, and if no right of action is given for such death by the law of the State where the injury or death resulted, no cause of action survives; but in most of the States of the United States, the action survives in favor of the parents of a minor child⁴ and in many of the mining States statutes have been passed, applying especially to mines, which give an action, independently of the general damage act.⁵ The parties

¹ Laws Minn. 1895, p. 386, ch. 171; *Perry v. Tozer*, 90 Minn. 431; 97 N. W. Rep. 137; Tenn. Act. 1893, c. 159. The employment of a child, in violation of the Tennessee statute, is held to subject the employer to damages, regardless of the fact whether the infant employee, at the time of his injury, was in the discharge of his duties or not. *Ornamental Iron & Wire Co. v. Green*, 65 S. W. Rep. 399; *Queen v. Iron Co.*, 95 Tenn. 458; 32 S. W. Rep. 460; 30 L. R. A. 82; 49 Amer. St. Rep. 985. For similar provision, in Missouri, see Sess. Laws, 1901, p. 212.

² Lord Campbell's Act, 9 & 10 Vict., Ch. 93, Secs. 1 & 2.

³ White Mines & Mining Remedies, Sec. 402 and cases cited.

⁴ Ala. Code, 1896, Sec. 25 (2537); Mass. Laws, 1897, ch. 565; *Welch v. Grace*, 167 Mass. 590; Burns' Rev. St. Ind. 1901, Sec 7085; Sess. Laws Colo. 1903, Ch. 77, Sec. 1; R. S. Mo. 1899, Secs. 2864 and 3820; and for construction of the statute see *Hammon v. Coal & Coke Co.*, 156 Mo. 232. Generally, for list of statutes, giving damages for death, and construction thereof, see White Mines & Mining Remedies, Secs. 402 *et sub.* See also Dresser Emp. Liab., Secs. 41 *et sub.*

⁵ R.S.Mo.1899,Sec.8820; see Chapter *Statutes Regarding Safety of Miners.*

competent to sue for the death of an infant are generally, its parents, or, if married, the wife or children.¹ These several parties are elsewhere discussed and their status under the different statutes, and a further treatment of the right of action is not deemed proper here, as the statute of the State where the action is brought, and of the State where the cause of action occurred, are always the best evidence of the right created.²

§ 510. **Measure of parent's recovery for injury or death of minor child.**—The basis, in law, for the recovery, by a parent, for the injury or death of a minor child, is his or her common law right to the services of the child, during its minority. While this rule seems devoid of the finer sentiment and affection that is known to characterize the family relation and to especially exist as between parent and child, the law deals not with the emotions or affections of the human family, but courts of justice, realizing the instability of submitting the measure of compensation as to such wounded feelings, to juries, prone to follow the humane promptings of their hearts, allow no money equivalent for the loss of other than the value of the services of the minor child, during its minority. Hence it is that a parent may have two sons, one past majority and the other less than the age when the law would emancipate him, and for the death or injury of the former the courts would allow the parent no compensation, while for the injury or death of the latter, the law would afford a substantial remuneration, based upon the loss of services

¹ Ala. Code, 1896, Sec. 25; Mass. Laws, 1898, Ch. 565; Burns' R. S. Ind. 1901, Sec. 7085; Sess. Laws Colo. 1898, Ch. 77; R. S. Mo. 1899, Sec. 2864. Under the rule in Alabama, if the injured infant would be prevented from recovering damages, because of the negligence of a fellow servant, this rule would prevent the father from recovering damages for loss of his service. *Woodward Iron Co. v. Cook*, 125 Ala. 349.

² See Chapter, *Parties to Action*.

during minority of the child.¹ This apparent inconsistency in the law, when carefully considered, is based upon the soundest principles, for, as said in a well considered case, which arose in Maryland,² “To submit to the jury the value of a life without limit as to years, would have been to leave them to speculate upon its duration, without any basis of calculation. The law entitles the mother to the services of her child during its minority only (the father being dead); beyond this, the chances of survivorship, his ability or willingness to support her, are matters of conjecture too vague to enter into the estimate of damages merely compensatory. According to the appellant’s theory, the mother and son are supposed to live on together to an indefinite age; the one craving sympathy and support, the other rendering reverence, obedience and protection. Such pictures of filial piety are inestimable moral examples, beautiful to contemplate, but the law has no standard by which to measure their loss.”

§ 511. **Employment of, in and about dangerous machinery — Statutes against.** — Independently of statute, it would be negligence, for which an employer would be compelled to respond in damages, if an employer should put an infant employee of years not sufficient to comprehend

¹ “The law presumes the life of a minor child to be of value to his parent, because he is entitled to his services and is responsible for his support, during minority. He is necessarily injured by a wrongful act, resulting in the death of such minor child, which thereby deprives him of the value of those services and casts upon him, in case of injury merely, the burden of legal liability for that support, when deprived of the value of such services, enhanced by the additional expense of providing medicine, medical attention and nursing during illness and for funeral charges, when he dies. To compensate him for this loss and this burden, the law allows the parent of such minor substantial damages and they may be measured by the experience and judgment of the jury.” *Parsons v. Missouri Pacific Company*, 94 Mo. l. c. 296.

² *State v. Baltimore and Ohio Company*, 24 Md. 84.

the danger of his surroundings, at work, at or near dangerous machinery or revolving shafts or gearing, likely to cause him severe personal injury, without proper warning or instruction.¹ But statutes have also been passed, in many States, making it unlawful to employ infants of a fixed age, in or about dangerous machinery, and where an infant is employed, in violation of the terms of a statute, since the breach of the statute would furnish a sufficient violation of duty, as to the child so employed, in case of a resulting injury to such child, the employer violating the statute would be compelled to respond in damages for the injury sustained as a result of violating the law, passed for the protection of the infant,² and proof of the unlawful employment and a resulting injury to the child is usually held to establish a *prima facie* case of negligence against the employer violating the stat-

¹ *Jancko v. West Coast M. & I. Co.*, 84 Wash. 556; 76 Pac. Rep. 78; *Chicago-Anderson Pressed Brick Co. v. Reinneeger*, 140 Ill. 834; 88 Amer. St. Rep. 249; 29 N. E. Rep. 1106; *Sachau v. Miller & Co.*, 123 Iowa, 887; 98 N. W. Rep. 900; *Carter v. Fred Dubach Co.* (La. 1904), 86 So. Rep. 952; *Northern Alabama Coal & Iron Co. v. Beacham* (Ala. 1904), 87 So. Rep. 227; *Lowery v. Anderson Co.*, 89 N. Y. S. 107; 96 App. Div. 465; *Meehan v. Atlas S. & M. Co.*, 87 N. Y. S. 1081; 94 App. Div. 306. "At common law the master is not required to guard dangerous machinery, though he might be liable for allowing a person, too young and inexperienced to appreciate the danger and assume the risk, to expose himself to the hazard." *Blair v. Helbel* (Mo. App. 1908), 77 S. W. Rep. 1017.

² *Saun. & B. (Wis.) Ann. St.*, Sec. 1728. See *Laws N. Y.*, Sec. 81, 1898, p. 853, ch. 192; *Lowery v. Anderson Co.*, 89 N. Y. S. 107; 96 App. Div. 465; *Mining Act. Ill.*, Sec. 22; *Marquette Third Vein Co. v. Dielle*, 110 Ill. App. 684. Where an accident happens to a child, under lawful age, when employed, such employment is, of itself, evidence of negligence. *Merino v. Lehmler*, 172 N. Y. 530; 66 N. E. Rep. 572. *Burns' Rev. Stat. Ind.* 1901, Sec. 70871, declaring that no person under 16 shall be allowed to clean machinery, while in motion, prohibits the cleaning of the parts of machinery intended to remain stationary, while the parts designed to move, are in motion. *Bower v. Locke*, 67 N. E. Rep. 1115.

ute,¹ and he is forbidden to set up his violation of a statute, intended for the protection of an infant employee, as a defense to an action by a minor for an injury to him, through the negligence of the employer.² But in Wisconsin and Pennsylvania, the mere employment of an infant, in or around dangerous machinery, in violation of a statute, will not render the master liable for an injury to the infant, unless the master's negligence is the approximate cause of the injury,³ and this is in accord with the general rule of pleading and practice, in personal injury actions, that the master's negligence must be the approximate cause of the injury, and any other rule is subjecting the master to an additional penalty, not named in the statute.

§ 512. **Warning or instruction to infant employees.** — An infant, engaging in a hazardous employment, is entitled to warning from the master of dangers which, on

¹ *Perry v. Tozer*, 20 Minn. 481; 97 N. W. 137.

² *Dion v. Richmond Co.* (R. I. 1902), 52 Atl. Rep. 889.

³ *Belles v. Jackson*, 4 Pa. Dist. R. 194; *Kutchera v. Goodwillie*, 93 Wis. 448; 67 N. W. Rep. 729. Revised Statute Ohio, Sec. 6986, prohibiting the employment of children under sixteen around dangerous machinery, makes it evidence of negligence to employ such a child in such service, because the statute indicates that such children are unfit, by reason of their age, to be so employed. *Breckenridge Co. v. Reagan*, 22 Ohio Cir. Ct. R. 71; 12 O. C. D. 50. An infant old enough to understand the danger of operating dangerous machinery, in the absence of a statute, assumes the risk of injury, the same as an adult. *Dunn v. McNamee*, 59 N. J. L. 498; 37 Atl. Rep. 61. A boy of 15, who undertakes to operate a machine with unguarded cog-wheels, with full knowledge of the risk of injury and of the absence of guards, is held to assume the risk, in *Higgins Co. v. O'Keefe*, 79 Fed. Rep. 900; 51 U. S. App. 74; 25 C. A. 220. "The mere employment of a boy under 12, in violation of the statute of Wisconsin, will not render the master liable for his injury, unless such injury resulted from the negligence of the master." This is the correct rule as the negligence of the master must be the approximate cause of the injury. *Kutchera v. Goodwillie*, 93 Wis. 448; 67 N. W. Rep. 729; *Evan v. American Iron Co.*, 42 Fed. Rep. 519; *Stevens v. Stevens*, 49 N. Y. S. 850; *Belles v. Jackson*, 4 Pa. Dist. Ct. R. 194,

account of youth and inexperience, he does not comprehend and appreciate; and if such warning or instruction be not given, or if given and they are inadequate, the master is held to be in fault and must respond in damages for the consequences of his neglect, in case of a resulting injury to such an employee.¹ But the danger must be such a one, as, coupled with the experience that the employer knows the employee to have, would lead him, as a reasonable man, to believe that he was ignorant of, before warning or instruction will be required of the master.² The master has a right to assume that his employees, being competent, will not be negligent, and it is not his duty to give warning or instruction as to possible or probable dangers, resulting from the negligence of his employees,³ nor is he bound to give warning or instruction as to dangers which are obvious, or those which he has reason to believe that the servant is already informed about, because the law never requires a wholly superfluous thing to be done.⁴

¹ *Evans Co. v. Crawford* (Neb. 1903), 93 N. W. Rep. 177; *Ittner Brick Co. v. Killian* (Neb. 1903), 98 N. E. Rep. 951. A servant put to sleep in a tent, near a place where blasts are discharged, is entitled to warning of the danger of such blasts. *Orman v. Salvo*, 117 Fed. Rep. 233; 54 C. C. A. 265. Where extraordinary risks may be encountered, known to the master, the servant should be warned of their character, as fully as possible. *Illinois Steel Co. v. Ruska*, 200 Ill. 280; 65 N. E. Rep. 734; *Waxahachie Oil Co. v. McLain* (Tex. Civ. App. 1902), 66 S. W. Rep. 226.

² *Brundige v. Dodge Mfg. Co.*, 183 Mass. 100; 66 N. E. Rep. 604; *Gaudet v. Stansfield*, 182 Mass. 451; 65 N. E. Rep. 850.

³ *Klos v. Hudson River Ore & Iron Co.*, 79 N. Y. S. 156; 77 App. Div. 566. A mine owner need give no warning of the danger of wandering from a path to work where a guide was furnished. *Smith v. Thomas Iron Co.* (N. J. 1903), 54 Atl. Rep. 562.

⁴ *Herbert v. Mound City Co.*, 90 Mo. App. 805. A mine employer need not warn an employee of the danger of trying to shove powder in a drill hole too small to receive it. *Kopf v. Monroe Stone Co.* (Mich. 1903), 95 N. W. Rep. 72. As opposed to the rule stated in the text, that negligence of an employer's employees is not to be presumed, it is held,

§ 513. **Sufficiency and extent of warning.** — Unless the instruction or warning to an infant inexperienced employee is sufficient to inform him of the nature and extent of the danger to which his employment subjects him, it had as well not been given and hence, the warning or instruction, to constitute a defense to an action for an injury for failing to give instruction as to surrounding dangers in the employment of an inexperienced employee, must be of sufficient definiteness to fully appraise the infant of the danger he is about to encounter, or it will be unavailing. If the employee is changed from a department of the business not attendant with much risk, to another branch of the service, where there is more danger in the performance of his duties, it is the duty of the master to give proper instruction as to the character of the new employment.¹ An

in Louisiana, in a late case, that if an inexperienced employee is put to work around dangerous machinery, and he is injured as a result of a fellow-servant's negligence, in failing to watch such machinery, the master is liable for not instructing him of his danger. *Lindsay v. Tioga Co.*, 108 La. 468; 82 So. Rep. 464. The warning of danger from a master to a young servant must usually be couched in such plain language as to insure the latter's understanding and appreciation of it. *Addicks v. Christoph*, 62 N. J. L. 786; 48 Atl. Rep. 196; 6 Amer. Neg. Rep. 117. It is not negligence to fail to instruct a boy 17 years old of the danger of using an obviously dangerous machine, where he has used it for several weeks, without injury. *Shine v. Cocheco Co.*, 173 Mass. 558; 54 N. E. Rep. 245. For list of similar cases, see *Bailey Mas. Liab. Inj. Serv.* 156. A boy of 16, sent to perform dangerous work, which he well knew how to perform, although outside the duties for which he was engaged, cannot recover, because no instruction was given him. *Worthington v. Goforth* (Ala.), 26 So. Rep. 531. See also *Ogle v. Mills*, 139 N. Y. 458; *Palmer v. Harrison*, 57 Mich. 182; *Tremantle v. North Star Co.*, 57 Minn. 52; *Collard v. Tecumseh Co.*, 151 Mass. 85; *Pratt v. Prouty*, 153 Mass. 333; *Tinkham v. Sawyer*, 153 Mass. 485; *Williamson & Sheldon v. Marble Co.*, 66 Vt. 427. For an injury to an employee from dangerous machinery, where it was held the master, on account of his youth, should have warned him of the dangers of working near dangerous machinery, see *Dowling v. Allen*, 102 Mo. 213; 14 S. W. Rep. 751.

¹ *Giordano v. Brandywine Granite Co.* (Del. 1901), 52 Atl. Rep. 332.

inexperienced employee placed in charge of a dangerous machine, should be instructed as to the manner in which the service may be safely performed and the risk incident to it and how it may be avoided and admonished against the dangers of doing it in a way different than that as to which the instruction is given.¹ And when the work which an infant employee is set to do, may be done in different ways, one of which is dangerous, but which experience has taught may be safely done in another manner, then the inexperienced employee is entitled to instruction as to the way in which it ought to be done.²

§ 514. **Assumption of risk by infant employees.** — A minor employee, of sufficient intelligence and discretion to understand the peril resulting therefrom, is held to assume the risk of dangers connected with his employment which are obvious to him, and he cannot hold his employer responsible for an injury therefrom, although the latter has failed to point out such danger to him, or to give him warning or instruction regarding such risks.³ In other

¹ *Welsh v. Butz*, 202 Pa. 59; 51 Atl. R. p. 591.

² *Brislin v. Kingston Coal Co.*, 20 Pa. Sup. r. Ct. 234. Repeated warnings to a boy eight years old, who works near cog-wheels, where they are open to plain view, are not insufficient because the danger was not explained to him, as the danger was open and obvious to anyone and a warning was sufficient. *Bibb Company v. Taylor*, 95 Ga. 615; 23 S. E. Rep. 188. A boy of nineteen should be told of the danger from the steepness of the grade in a tramway, and the liability of cars, he was running from the mine to the dump pile, from getting loose, but where he was advised of such danger, by a fellow-servant, this is sufficient, without direct warning by the employer. *Alabama Collinsville Coal & Iron Co. v. Pitts*, 18 So. Rep. 185. The employer need not inform the employee of the chemical composition of different kinds of poisonous leads, but only the effect of their poisonous characteristics, and the proper precaution to avoid being poisoned. *Fox v. Peninsular White Lead Works*, 84 Mich. 676; 48 N. W. Rep. 208.

³ *McNamana v. Logan*, 100 Ala. 187; *Hesse v. National Co.*, 66 N. J. L. 652; 52 Atl. Rep. 384; *Jones v. Phillipps*, 39 Ark. 17; 48 Am. St. Rep.

words, the mere fact of the infancy of the injured employee is not, of itself, sufficient to exempt him from the application of the doctrine of assumed risk, but if the injury to him resulted from a danger that was plainly obvious to one of his age and intelligence, he cannot recover, although no warning or instruction was given him,¹ but to enable him to recover, it must appear that he did not know or appreciate the danger, and had not equal means of knowledge with the master of knowing of the defects or dangers in his surroundings, or that, by the exercise of ordinary care, he could not have discovered such peril, due regard being had to the age, capacity and intelligence of the injured servant.² But mere knowledge of the danger of his employment is not enough to defeat an action by an inexperienced infant for an injury received in his employment; it must appear that the injured employee possessed sufficient intelligence and capacity and had sufficient experience to understand, not only the danger, but the liability of resulting injury, therefrom, and a mere knowledge of the defect in an appliance without an appreciation of the danger to which such defect subjects him, will not defeat his action, on the ground of assumed risk.³ And infants under the prescribed statutory age are not usually held to have assumed the risk of injury from the employment, as the statutory age is taken as the age of

264; *Nugent v. Milling Co.*, 131 Mo. 241; 33 S. W. Rep. 428; *Costello v. Judson*, 21 Hun, 396; *Buckley v. Mfg. Co.*, 113 N. Y. 540; 21 N. E. Rep. 717; *Oszkoscil v. Pencil Co.*, 6 N. Y. S. 501; 25 N. Y. St. Rep. 925; *Jones v. Roberts*, 57 Ill. App. 56; *Stuart v. R. R. Co.*, 163 Mass. 391; 40 N. E. Rep. 180. But see, *contra*, *Dowling v. Allen*, 74 Mo. 13; 41 Am. St. Rep. 298; *Railroad v. Frawley*, 110 Ind. 18; 9 N. E. Rep. 594. See, as supporting the text, *Dresser Emp. Liab.*, Sec. 96, p. 441 and cases cited.

¹ *Hildenbrand v. Marshall* (Tex. Civ. App. 1902), 69 S. W. Rep. 492.

² *Manchester Mfg. Co. v. Polk*, 115 Ga. 542; 41 S. E. Rep. 1015.

³ *Welsh v. Butz*, 202 Pa. 59; 51 Atl. Rep. 591.

discretion and understanding of the danger, by the courts, and the negligence arising from a violation of the statute, on the employer's part, is held not to be excused or waived by the obviousness of the danger, to the infant employee.¹

§ 515. **Same — Dangers outside scope of employment.** — While a minor is held to assume those risks incident to his work, as usually performed, or those which are obvious to him, in the customary discharge of his work,²

¹ *Hickey v. Taaff*, 82 Hun (N. Y.), 7; *Cooke v. Lalance Grosjean Co.*, 83 Hun (N. Y.), 351; *Dresser Emp. Liab.*, pp. 601, 601. For various incidents of risks assumed by infants, see Chapter, *Incidents of Risks Assumed*. "There is no presumption that a child of fourteen years has as much prudence and understanding as an adult; and where such child has been injured while engaged in dangerous work which he has been commanded to do, it is for the jury to say, considering his age and experience, whether he assumed the risks of his employment." *Ittner Brick Co. v. Killian* (Neb. 1908), 93 N. W. Rep. 591. In considering the assumption of risk, by an infant, the jury has a right to consider his age, experience and capacity for understanding the danger, in the absence of a proper warning to him of the dangers of the service. *Hill v. Southern Pac. Co.* (Utah, 1901), 63 Pac. Rep. 814. Minor servants are held to assume, by their contracts of employment, those ordinary risks of their service, that are obvious to them or that have been pointed out to them, in a manner suited to their youth and inexperience. *Carrington v. Mueller*, 65 N. J. L. 244; 47 Atl. Rep. 564. An employee who is eighteen years of age, has not, on that account, a greater right to recover damages, than one of age. His age will enable him to understand danger as well as one a few years older. *Carrierie v. Williams*, 104 La. 678; 29 So. Rep. 333; *Carter v. Baldwin*, 81 S. W. Rep. 204. For cases, where minor employees were held not to assume the risk of a dangerous overhanging rock, that had evidences of being loose, see *McMillan Marble Co. v. Black*, 89 Tenn. 118; 14 S. W. Rep. 479; *Carter v. Baldwin*, 107 App. 229; 81 S. W. Rep. 204. A ten-year-old boy, employed to couple coal cars, as a matter of law is held entitled to recover and not to assume the risk, in *Brazil Block Coal Co. v. Gaffney* (Ind.), 4 L. R. A. 850; 21 N. E. Rep. 1102.

² *Carter v. Baldwin*, 107 Mo. App., p. 229; 81 S. W. Rep. 204; *Flick v. Jackson*, 8 Super. Ct. (Pa.) 378; 39 W. N. C. 534; *Anderson v. Winston*, 81 Fed. Rep. 528; *Morbank v. Home Mining Co.*, 53 Kan. 731; *Showalter v. Fairbanks M. & S. Co.*, 88 Wis. 376; *Aldrich v. Furnace Co.*, 78 Mo. 559.

he is not held to assume the risk of dangers with which he is not familiar, or those occurring in the performance of duties that he is asked to perform, outside the scope of the general duties he was employed to perform.¹ In a recent California case an infant who was reasonably familiar with the duties of the work he was performing when he received an order to perform other duties, not within the range of his employment, was held bound to exercise only such judgment in view of his knowledge of the danger, attending the performance of the task he was asked to do, as he possessed, and it was decided that he would not necessarily assume the increased risk from a defective appliance, although he was aware of the defect, and an adult, with the same knowledge, would have been held to assume the risk of injury therefrom.²

§ 516. Injury to, from fellow-servant's negligence. — It follows, from the rule that an infant employee is held to assume the injuries resulting from the work and ordinarily incident to the service in which he is engaged, that he cannot recover for an injury caused by the negligence of a fellow-servant, for as to such injuries, he is held to have waived a right of action, in entering into the contract of employment. The rule exempting the master from liability for injuries from the negligence of a co-employee in the same branch of service with the one injured, is a rule of the common law applicable to all engaging in the employment of another and under this policy the servant, by his employment, is held to waive, as to himself, the rule of responsibility, on the part of the employer, which

¹ *Brewer v. Tenn. Coal Co.*, 97 Tenn. 615; 37 S. W. Rep. 549.

² *Foley v. California Horseshoe Mining Co.*, 115 Cal. 184; 49 Pac. Rep. 42. But as to an injury which a servant knowingly encounters, although outside the scope of his employment, see *Massie v. Peel Splint Coal Co.*, 41 W. Va. 620; 24 S. E. Rep. 644.

obtains as to third parties, to respond in damages for injuries from the negligence of his employees, done in the scope of their employment.¹ “The rule applies to all who become servants, whether they are of full age and competent to contract or not,”² for, indeed, it would not do to exempt from the policy of the law, those of less than twenty-one and hold those in all cases, over that age, for the settled policies of the law are enforced, regardless of the age of those upon whom it operates, and oftentimes, in the application of the doctrine, an infant of little less than majority, is more competent and skilled in a given service than a much older man of less experience or natural aptitude for the given service.

§ 517. **Placing infant under care of experienced employee.** — If an employer should place an infant, inexperienced employee, under the care of an incompetent servant, to show him, or assist him in the performance of his duties, he would be liable for a resulting injury to such inexperienced employee, caused by the negligence of the incompetent servant.³ But where the employer selects a known competent and skilled employee and orders the infant employee to obey his orders and assist him in the work of the employer, he is not, generally, liable for any subsequent injury to the infant servant, from the neglect or want of skill on the part of the employee in whose society the infant is placed.⁴ In a recent New York case, the defendant had placed the injured employee, an inex-

¹ Dresser, Emp. Liab., Sec. 89, p. 400 and cases cited.

² King v. Boston & W. R. Corp., 9 Cush. (Mass) 112; Dresser Emp. Liab., *supra*. In Alabama, the father of an infant child, suing for his death, by reason of the negligence of a fellow-servant, is held to be debarred of a cause of action. Woodward Iron Co. v. Cook, 124 Ala. 343.

³ O'Connor v. Golden Gate Co., 135 Cal. 537; 67 Pac. Rep. 966.

⁴ Hussey v. Cogger, 112 N. Y. 618; 20 N. E. Rep. 561; 8 L. R. A. 559; 8 Amer. St. Rep. 790; Cullen v. Norton, 126 N. Y. 1; 26 N. E. Rep. 905.

perienced servant, under the care of an experienced servant, to assist in the demolishing of a blast furnace, where dynamite was necessary to be used. The servant in whose care the infant employee was placed did not warn him of the danger of the use of dynamite and he was injured by a premature explosion, caused by tamping the powder, but it was held that as the defendant had placed him in the hands of a competent employee he was not liable for the latter's failure to give him warning of the dangers of the service, and as the inexperienced employee's injury was due to the negligence of a fellow-servant, there could be no recovery.¹

§ 518. **Responsibility for accidents to infants.**— In some jurisdictions, the employer is held so far under the obligation to take the necessary precautions to avoid accidents to his employees, which by reasonable care and caution could have been avoided, or foreseen, even as a result of their imprudence, inexperience or inability, as to render him liable for an unexpected accident to an employee during a dangerous employment ordered by him, especially if the employee is an infant, unacquainted with the danger incurred, and having neither the prudence or experience necessary to protect himself.² This rule, however, is not generally followed, but it is generally held, that as to those injuries sustained by the employee, even though he may be under the age of majority, which an ordinarily careful and skillful employer could not have foreseen would happen in the business, as usually conducted, there is no liability on the part of the master,³ and the rule would not

¹ *O'Brien v. Buffalo Furnace Co.*, 78 N. Y. S. 830; 68 App. Div. 451.

² This rule was recently announced in a Canada case. *McCarthy v. Thompson-Davidson Co.*, Rap. Jud. Que., 18 C. S. 272.

³ *Beasley v. Transfer Co.*, 148 Mo. 413; *Hysell v. Swift & Co.*, 78 Mo. App. 89; *Bessemer Land & Improvement Co. v. Campbell*, 121 Ala. 50;

be different because of the lack of majority of the employee injured.

§ 519. **Contributory negligence of infant.** — The rule seems to be well settled that a child is not to be judged by the strict standards of an adult, nor is he charged with contributory negligence if he acted as might reasonably be expected from one of his age and capacity. In the case of an infant, therefore, the question is not whether the act is such as an ordinarily prudent person of mature years would have committed, but it is whether the act is such as may be expected from a child of the knowledge, age and discretion such as the injured child is shown to be and possess.¹ Unless the infant is so young as to require the trial court to say that he could not contribute to his own injury, the question of his contributory negligence, in a given case, is one for the jury to pass upon, by considering all the circumstances and the evidence of his age, capacity, experience and his knowledge of the particular danger.² But the mere infancy of one injured, will not always protect him from the result of his own negligence and many cases arise where the courts hold, as a matter of law, that an

25 So. Rep. 798. In the last case cited, it was held that the fact that the foreman could not have foreseen that the employee would be suffocated in the defendant's mine, by reason of a fire, would not relieve the defendant, where a safer course could have been followed.

¹ *Anderson v. Union Terminal Co.*, 161 Mo. 411; 61 S. W. Rep. 874; 81 Mo. App. 116. In *Railway Company v. Young* (81 Ga. 416), it is said that "No court can hold that childhood and manhood are bound to observe the same degree of diligence." This is certainly a terse statement of a reasonable rule.

² *Day v. Citizen & Co.*, 81 Mo. App. 471. The infancy of the plaintiff is only material as affecting the contributory negligence and contributory negligence is only material when the defendant has been shown guilty of some negligence. *Pueschell v. K. C. Wire & Iron Co.*, 79 Mo. App. 459.

infant will be precluded from recovering, because of his negligence.¹

§ 520. **Instruction on contributory negligence of infant.**—Although some of the cases hold that where contributory negligence can be predicated of an infant's acts, the same degree of care will characterize his conduct as that in the case of an adult person,² the better doctrine is deemed to be that as to an infant, his discretion and intelligence are factors to be considered in determining his ability to avoid the danger, notwithstanding his knowledge of the risk that he may incur by a given act. In Missouri an instruction that a child was "bound to exercise such reasonable care and caution for his personal safety as a boy of his age, experience and intelligence was individually capable of" is error, as requiring the highest degree of care of which the child was capable, instead of that degree of care which, under similar circumstances, would reasonably

¹ *Spillane v. Railway*, 135 Mo. 414; *Payne v. Railway*, 136 Mo. 562; s. c. 119 Mo. 405; cited and distinguished in *Anderson v. Union Co.*, 81 Mo. App., p. 120. In *Graney v. St. L., I. M. & S. Co.* (140 Mo. 89), the Supreme Court of Missouri held that the degree or care of a boy was not different from that required of a man, if the boy was chargeable with contributory negligence at all. A boy of twelve was there held chargeable with contributory negligence, as a matter of law, where the facts showed that he understood the danger; could have avoided it and voluntarily assumed it. The intelligence and ability of an infant of thirteen to understand the danger so as to assume the risk, is held a jury question, in Alabama, in *Tutweiler Coal, Coke & Iron Co. v. Enslen*, 129 Ala. 386; 39 So. Rep. 600. For contributory negligence, on part of boy of fourteen, ordered to handle giant powder, see *Orman v. Mannix*, 17 Colo. 564. The fact that an infant, employed to work on a scaffold, knew of the absence of lagging, and that blocking had been put between the timbers, will not render him negligent, as a matter of law, where the construction of the scaffold devolved upon superior servants, who made frequent inspections thereof. *Eddy v. Aurora Iron Mining Co.* (Mich.), 46 N. W. Rep. 17.

² *Graney v. St. L., I. M. & S. Co.*, 140 Mo. 89.

be expected of one of his years and capacity.¹ Likewise, it is error to instruct that if an infant had sufficient mental capacity to know whether or not he was liable to be injured by taking the position in which he sustained the injury complained of, then he was guilty of negligence in taking such position, as he may have lacked the discretion of an adult person to avoid the danger, although he really knew and understood it.²

§ 521. **Infant trespasser burned, in ash pile.** — As a general rule, the liability of one charged with negligence, where the injury was to one occupying the position of a trespasser, is only held to obtain for an injury from negligence after the defendant had discovered the trespasser. This results from the relation of the parties, as a liability, for negligence, is only held to obtain where there is a breach of some duty owing to the injured party and there would be no duty, as to a trespasser, or licensee, except not to wantonly injure him, after discovery of his peril.³ This rule obtains, as well in the case of an infant trespasser as in the case of an adult, occupying this position, and, in Missouri, it is held that a lessee of premises, who piles ashes and cinders thereon, is not liable, to an infant, who is burned while running over such ash pile, to reach some boys fishing at a near-by pond on the premises, for the rule is general that parties, occupying such a position, whether

¹ *Stern v. Benslecke*, 161 Mo. 146; 61 S. W. Rep. 594.

² *Thompson v. M. K. & T. Co.*, 93 Mo. App. 548; 67 S. W. Rep. 693.

³ *Cooley Torts*, Sec. 606; *Moran v. Car Co.*, 184 Mo. 642; *Klix v. Nie-*
man, 68 Wis. 271; *Gillisple v. McGowan*, 100 Pa. St. 144; *Richards v.*
McConnell, 63 N. W. Rep. 915; 45 Neb. 367; *Margenthaler v. Kirby*, 79
Md. 182; 28 Atl. Rep. 1065; *Oil Co. v. Martin*, 70 Tex. 400; *Sterger v.*
Vansiclen, 132 N. Y. 499; 30 N. E. Rep. 987; *Ratte v. Dawson*, 50 Minn.
450; 52 N. W. Rep. 965; *McGinnis v. Butler*, 159 Mass. 233; 34 N. E. Rep.
259; *Grindley v. McKechie*, 163 Mass. 494; 40 N. E. Rep. 764; *Peters v.*
Bowman, 115 Cal. 348; 47 Pac. Rep. 113; *Cusick v. Adams*, 115 N. Y. 55;
21 N. E. Rep. 673.

old or young, are trespassers and the proprietor owes them no duty, save not to negligently injure them, after discovery of their peril.¹ But if there is a violation of a statutory duty, so that the injured party could claim a violation of a duty, as to him, without having to rely upon a discovery of his peril by the defendant, in time to have avoided the injury, as, in the case of a boy getting into a pile of smoldering slack, at the mouth of a coal mine, where a statute required the fencing of such slack, then the court might permit a recovery, as a recovery in such a case was sustained by the United States Supreme Court.²

§ 522. **Appointment of guardian to bring suit.**—An infant being incompetent, by reason of his disability, to bring suit in his own right, it is necessary, if there is not a regular guardian of his person already appointed, to procure the appointment of a guardian *ad litem* for the purpose of prosecuting the suit. The statutes of the different States differ as to the preliminaries necessary to be complied with in the appointment of a guardian to prosecute the suit, but, usually, the infant is required to file a petition, asking for the appointment of a guardian or next friend, to prosecute the suit, if he is not already under guardianship and the guardian is required to accept the appointment, in writing.³ A petition which fails to show

¹ *Smith v. Jacob Dold Company*, 82 Mo. App. 9. See, also, *Overholt v. Vleths*, 95 Mo. 422; *Witte v. Steffel*, 126 Mo. 295; *Hargraves v. Deacon*, 25 Mich. 1.

² In this case, a boy was injured by getting into a smoldering and unguarded pile of slack, at the mouth of a coal mine. The statute of Colorado required the fencing of slack thrown from coal mines and as the defendant had violated the statutory duty imposed upon it, it was held liable to the plaintiff for the injury sustained. *Railway Company v. McDonald*, 152 U. S. 262.

³ Wis. Rev. St., Sec. 2613. Under this statute, an appointment of a guardian, *ad litem*, continues until the disability ceases, unless the guardian is sooner discharged by order of the court appointing him.

that the guardian who sues in behalf of the infant plaintiff, has been regularly appointed is held bad, on demurrer, in some jurisdictions,¹ while, in others, the defect is deemed waived unless taken especial advantage of, by answer.²

An infant's marriage would not dispense with the appointment of a guardian. *Alexander v. Davis*, 42 W. Va. 465; 26 S. E. Rep. 291. Ky. Civ. Code, Sec. 51, *Walch v. Davis*, 32 S. W. Rep. 281; 2 Starr, &c., Ill. Ann. St. (2 ed.), p. 1470, Sec. 21; *Sill v. Sill*, 185 Ill. 594; 57 N. E. Rep. 812; Rev. St. Texas, Secs. 3498u and 3498v; *Lumsden v. C. R. I. & P. Co.*, 28 Tex. Civ. App. 187; 56 S. W. Rep. 605; Iowa Code, Sec. 3482; *Wil. v. Schlossler*, 82 N. W. Rep. 489.

¹ *Higgins v. Hannibal & St. Joe Co.*, 36 Mo., p. 481.

² "The petition should allege the appointment, in the mode pointed out by law, of the next friend, for the minor plaintiff. But the issue that the petition does not show that such next friend has not legal capacity to sue, on behalf of such minor, in that it does not contain any such allegation, is not raised by a general denial. But where the answer specifically denied that such person is the next friend of the plaintiff, it is not a general denial, on that point." *Cohn v. Metropolitan Co.*, 182 Mo. 577; 81 S. W. Rep. 846. See Chapter *Parties to Actions for Injuries in Mines*.

CHAPTER XXVI.

INJURIES TO THIRD PERSONS IN MINES.

- SECTION 523.** The principle, *respondeat superior*.
524. Act must be within scope of employment.
525. Same — Common law and statutory negligence.
526. Assumption of risk by third parties.
527. Contributory negligence a defense — Injury to striker.
528. Willful, malicious act of servant.
529. Incompetency of servant.
530. Liability does not extend to acts of substitutes.
531. Injury to trespassers.
532. Same — Infancy of trespasser immaterial.
533. Injury to licensee.
534. Pleading injuries to.
535. Joint liability of master and servant.
536. Jury questions in actions for.

§ 523. The principle, *respondeat superior*. — In an action to recover damages for the negligence of another, on the principle of *respondeat superior*, the plaintiff cannot recover, unless it is made to appear that the relation of master and servant in fact existed, whereby the negligent act of the servant, in law, is imputed to the master.¹ Where the relation of master and servant can be said to exist, however, it is immaterial how the method of payment for services is regulated or adjusted, or how extensive the dependence of the agent may be, in the line of his agency the master is responsible for his negligent acts.² Accordingly, where a refining company employed a person

¹ White Mines & Mining Remedies, Sec. 404. p. 537 and cases cited. For distinction between intentional acts of servant, within and beyond scope of authority, see Cooley Torts, pp. 626, 627 and cases cited. See, also, Wesley City Coal Co. v. Healer, 84 Ill. 126; Ardesco Oil Co v. Gilson, 10 Mor. Min. Rep. 669.

² Cooley Torts, p. 626.

to sell and deliver its commodity to customers, being paid by a commission on the amount of sales, he is held to be an agent, or servant of the company, for whose negligence, in the conduct of the business, or those employed by him, the company would be liable.¹ But the company would not be liable for a specific act of negligence done by one of the company's drivers, under orders from the purchaser, for if, in delivering such commodity to a customer, the customer directs a driver how to throw off coal, or other substance, and in obeying the order, the purchaser is injured, the negligence will be imputed to the purchaser and not to the master, for in the doing of this act, the customer would make the company's agent his own agent, and his negligence would be his, in law.²

§ 524. Acts must be within scope of employment.— In order to make the employer liable for the acts of his servants, where injury results to a third party, the act of negligence must be one performed within the scope of his employment and in furtherance thereof, or it will be regarded as the individual act of the servant and the master will not be responsible therefor.³ The relation of master and servant does not impose on the master liability for any act of the servant, unless the act was done in the performance of the master's business and for the accomplishment of the object for which the servant was employed. Where

¹ *Riggs v. Standard Oil Co.*, 130 Fed. Rep. 199.

² *Atherton v. Kansas City Coal & Coke Co.*, 106 Mo. App. 591; 81 S. W. Rep. 223. One cannot be held liable, under the doctrine of respondeat superior, unless he has the power to discharge the negligent employee whose act occasions the injury. In the absence of control, no liability exists. *Crudup v. Schreiner*, 98 Ill. App. 337.

³ *Cooley Torts*, p. 534; *Vogell v. Marble & Granite Works*, 49 Mo. App. 354; *Railroad v. Cooper*, 82 S. W. Rep. 517; *Machine Co. v. Bobbst*, 56 Mo. App. 427; *State v. Brownlee*, 58 Mo. App. 126; *Nichols v. Nelson*, 45 Mo. App. 446.

the servant, for his own pleasure or amusement and not to serve his master, or advance his interest, injures another, he alone and not the master, is liable for damages therefor.¹ But if the act done came within the line of the duties of the negligent servant, the principal is liable, even though the act was done in violation of express orders, for the injured third party could not be chargeable with the effect of a violation of such orders, after injury, by an employee whom the master had placed in a position and a business where he was liable to cause such injury, in the discharge of the duties of his employment.²

§ 525. **Same — Common law and statutory negligence.** — Since the basis of the right of recovery as against a master for a negligent act of his employee, within the scope of his authority, is the fact of agency on the part of the employee doing the wrong, where such agency exists and the wrongful or negligent act is committed within the general scope of the employment, it is immaterial whether the negligence arises from a violation of a common law or statutory duty, on the part of the employer, or his employee. The doctrine of agency applies as well to negligence upon common law principles, as to violations of duty arising from a statute upon the subject, and the master is liable for the negligence of his servant, committed in the course of his employment and resulting

¹ *Bestwhistle v. Woodward*, 95 Mo. 113; *Sammls v. Chicago, B. & Q. Co.*, 97 Ill. App. 28; *Lytle v. Crescent &c. Co.*, 66 S. W. Rep. 240.

² *Humbser v. Scott*, 5 Mo. App. 597; *Murphy v. Wilson*, 44 Mo. 313; *Began v. Reed*, 96 Ill. App. 460; *Alsever v. Minn. & St. L. Co.*, 88 N. W. Rep. 841. The last two cases cited arose from an engineer, in the discharge of steam, from a stationary engine, doing so, in such a manner as to injure a passer by. Where a petition fails to show that the negligent servant was a servant of the defendant and his act was one within the line of his duties, the same is insufficient to allege a cause of action,

in injury to another, regardless of the character of the negligent act.¹

§ 526. Assumption of risk by third parties. — While the common law doctrine of assumed risk, as originally announced, was held to grow out of the implied contract of the employment, on the part of the employee to assume, as risks incidental to his service, all dangers apparent to an ordinarily prudent servant and all such as arose from the negligent acts of his co-employees and his implied contract could not be said to arise in the absence of the relation of master and servant, still to prevent injustice being imposed upon the employer, the doctrine has been recognized to extend to cases of injuries to others than employees, as to risks open and obvious and those that an ordinarily careful person could have anticipated, the same as if such relation had existed. Illustrative of this rule is a late Federal case, where the injured party was helping to hold a guy rope, tied to a chain, which came untied and injured him. The employees of the defendant had tied the negligently tied knot, while loading a barge with coal and the injured party had examined the knot and thought it was sufficient and all right. It was held that he assumed the risk of the injury from the knot coming untied and hurting him and could not recover, because of the defendant's servant's negligence.²

§ 527. Contributory negligence a defense — Injury to striker. — The liability of the master for injuries from the

if challenged. *Thomas v. McGuinness*, 94 Ill. App. 248. The test of liability is not so much the character of the act, as whether or not it was done within the scope of the servant's authority. *Dolan v. Hubinger*, 109 Iowa, 408; 80 N. W. Rep. 514. An employer is not liable for an injury to a third person, from a negligent act of his employee, unless the act was one which pertained to the duty that the employee was employed to do. *Johansen v. Pioneer Fuel Co.*, 72 Minn. 405; 75 N. W. Rep. 719

¹ *Osborne v. McMasters* (Miss.) 41 N. W. Rep. 543.

² *Farrell v. Continental Iron Works*, 106 Fed. Rep. 987; 46 C. C. A. 75.

negligent acts of his servants, being dependent upon the fact that his negligence, through his employees, was the approximate cause of the injury, if the injury resulted from other causes, as the contributory negligence of the plaintiff himself, this is a good defense to the action. Illustrative of this well established rule, is the case of an injury to a striker, or bystander, by employees who succeeded him in the employment of a mining company. It is held that the company is not liable for the result of a gun-shot wound, inflicted upon a non-combatant during a conflict between former employees and their successors, where the conflict was precipitated by the conduct of such former employees and the guards employed by the company and the employees who were being guarded, obtained possession of arms, without the consent of the company, which had been originally furnished them for protection, but subsequently taken away.¹

§ 528. **Willful, malicious acts of servant.** — An act of a servant, while engaged in his master's work, but entirely disconnected therefrom, done solely for the accomplishment of an independent, malicious purpose, of the servant, and not in furtherance of the duties of his employment or in the scope of his employment, is not the act of the master, and for injuries resulting therefrom to a third party, the servant alone is responsible.² This rule of non-liability is illustrated by a recent case in Rhode Island, where some children, in passing defendant's factory, so angered its employees, that one of them threw a piece of iron and struck a child. It was held, by the court, that in the per-

¹ *Thorburn v. Smith*, 10 Wash. 479; 39 Pac. Rep. 124. To enable a party to recover damages for an injury from the defendant's servant's negligence, he must establish his own freedom from contributory negligence. *Stewart v. Philadelphia W. & B. Co.* (Del.), 17 Atl. Rep. 689.

² *Evers v. Krause* (N. J. 1904), 58 Atl. Rep. 181; *Healy v. Patterson* (Iowa, 1904), 98 N. W. Rep. 756.

formance of such a willful, malicious act, the servant could not be said to act for the master and the defendant was held not liable.¹ But in order to make the act done by a servant, the servant's act alone, there must generally be a turning away from the master's service, and an entering upon the affair as one which concerns the servant only.²

§ 529. **Incompetency of servant**—To render the employer liable to a third person for the acts of an incompetent servant, there must be clear proof of such incompetency and retention of an incompetent employee, after knowledge of his incompetency. The master does not owe to third persons the same duty to employ and retain competent employees that he does to those in his service, for the latter, by virtue of their employment, have a right to rely upon the proper discharge of this duty, as they have to demand reasonably safe tools and appliances, for, in fact, the servants in his employ are as much a part of the master's plant as his tools,³ but as to strangers, the same degree of responsibility does not exist, particularly as to licensees or those toward whom the master has not assumed a position which would enable them to expect that they should only be brought in con-

¹ *Benton v. Hill Mfg. Co.*, 26 R. I. 192; 58 Atl. Rep. 664.

² *Krzkowsky v. Speering*, 107 Ill. App. 498. For case of willful injury by servant, outside of his employment and to gratify his own malice, although he was in the master's service, see *Brennan v. Merchant & Co.*, 205 Pa. 258; 54 Atl. Rep. 891. The tortious act of an employee in throwing coal at a boy, playing near the employer's engine, as a result of which, to avoid being struck, the boy is fatally injured, renders the employer liable. *Pierce v. North Carolina Co.*, 124 N. C. 83; 44 L. R. A. 816; 32 S. E. Rep. 899; *Kline v. Central P. R. Co.*, 87 Cal 400; 99 Amer. Dec. 282; *Denver & R. G. Co. v. Harris*, 122 U. S. 597; 30 L. Ed. 1146. Owner is liable for act of employee in throwing a large board down, at a place where injury to the public was apt to result. *Holmes v. Tenn. Coal, I. & R. Co.*, 49 La Ann. 1465; 22 So. Rep. 403.

³ *Bailey's Mas. Liab. Inj. Serv.* 186.

tact with competent employees, in the discharge of some business relations with such employee.¹

§ 530. **Liability does not extend to acts of substitutes.**— The liability of an employer for the negligence of a servant does not extend to negligent acts, which result in injury to a third party, where the negligence is that of a substitute, engaged by the master's servant without any authority to delegate his master's power as to the particular work in charge of the servant at the time of such delegation.² But in case of an injury to a third person, by a substitute of the servant of the defendant, the fact that the employee was present, so as to direct the work of the substitute, a volunteer in assistance to the servant, the presumption may be indulged in that such servant also participated in the work, which was delegated to him, by the defendant.³

§ 531. **Injury to trespasser.**— The authorities are unanimous in holding that a person is under no legal duty to keep his land or property in a safe condition for trespassers. As already seen,⁴ the basis of the right of action, for a personal injury, is a breach of duty toward the person injured, by the one causing the injury, and where no such duty exists, no liability results, merely from the fact

¹ For alleged incompetency of surgeon, employed by him, see *Big Stone Gap v. Ketron* (Va. 1903), 45 S. E. Rep. 740; *Missouri, K. & T. Co. v. Freeman* (Tex. Civ. App. 1903), 73 S. W. Rep. 542. A finding that an injury to a third party was due to a known incompetent servant, was supported, in *McGahie v. McClenna*, 83 N. Y. S. 692; 86 App. Div. 263.

² *Appel v. Eaton & Co.*, 97 Mo. App. 423; 71 S. W. Rep. 741.

³ *Appel v. Eaton & Prince Co.*, *supra*.

⁴ Section 2, *et sub.* *Zoebisich v. Tarbell*, 10 Allen, 385; *Cramlich v. Wurst*, 86 Pa. St. 74; *Severy v. Nickerson*, 120 Mass. 306; 21 Amer. St. Rep. 514; *Shear. & Redf. Neg.* (4th ed.) 97, 98; *Thompson Neg.* 303, 1162; *Whart on Neg.* 344 *et sub.*

of the injury. The only duty which the law recognizes toward a trespasser, on the part of the owner of property, is not to willfully injure such trespasser, or to avoid injury to him, after discovery of his presence.¹ If, therefore, it is not shown that the trespasser was willfully injured, or that he was injured as a result of a want of ordinary care, after his presence was discovered, there is no liability shown, for such an injury.² As said in a leading California case,³ however, "A wrong-doer is not an outlaw, against whom every man may lift his hand. Neither his life, limbs or property, are held at the mercy of his adversary. On the contrary, the latter is bound to conduct himself with reasonable care and prudence, notwithstanding the fault of the former; and if, by so doing, he can avoid injuring the person of the former, he is liable if he does not, if by reason thereof, injury ensues." So the rule is well established that if the employer, or his employee, willfully injure a trespasser or fail to avoid injury to him, after discovery of his danger, they will be liable, when, by ordinary or reasonable care, the injury could have been avoided.⁴

§ 532. **Same — Infancy of trespasser immaterial.** — Since the right of action, for personal injuries, is dependent upon a fact and that fact is the legal duty toward the injured person, by the one causing the injury, in the absence of such fact, there can be no liability, regardless of the infancy of the injured person.⁵ Hence, the rule is quite generally followed, that the mere fact of the infancy of

¹ Shear. & Redf. Neg. *supra.*, and cases cited.

² Kohn v. Lovett, 44 Ga. 251; Hargreaves v. Deacon, 25 Mich. 1; Roulston v. Clark, 3 E. D. Sm. 366; Thompson Neg., *supra.*

³ Needham v. San Francisco &c. Co., 37 Cal. 409.

⁴ Wharton Neg., Sec. 844 *et sub.*, Thompson Neg. 303.

⁵ Frost v. Eastern R. R. Co., 64 N. H. 220; 9 Atl. Rep. 730; McDonald v. U. P. Co., 35 Fed. Rep. 38; Woods v. Lloyd (Pa.), 16 Atl. Rep. 43; Calligan v. Metacomet Co., 148 Mass. 527.

the injured person, will not, of itself, be sufficient to render a person liable for an injury to such infant trespasser, unless there are other facts or circumstances connected with the injury, sufficient to hold the owner liable.¹ Perhaps the only exception to this rule is what is known as the "turn-table cases,"² where the rule is announced that on account of the infancy of the injured person, if the owner has been guilty of leaving, in a place likely to attract children, such dangerous agencies as will cause injury to them, there is a liability. The propriety of these cases, upon principle, has been seriously questioned, but they furnish an exception to the rule stated. However, unless there are such facts as bring a case within such an exception, there is no liability for an injury to an infant trespasser, upon principle, any more than there is for an injury to an adult, under the same circumstances, as the necessary condition, upon which such liability depends, does not, in such case, exist. This rule is illustrated by a well considered case, where a coal company left exposed, near a town of seven hundred people, a hot pile of smoldering slag, through which an infant ran and burnt himself severely. Although the infant was but ten years old and a stranger in the town, it was held that he was but a trespasser and the defendant was not liable.³

§ 533. **Injury to licensee.** — As to a mere licensee, who is given permission to use the premises of another, without benefit to the owner, his position is not different from that of a trespasser, and no duty is owing toward him, to maintain the premises in a reasonably safe condition,⁴ But

¹ *Ante, idem.* Beach Con. Neg. 187, 141, pp. 175, 178.

² Railroad Co. v. Stout, 17 Wall. 657; 2 Dillon, 294.

³ Woods v. Lloyd (Pa.), 16 Atl. Rep. 43; McDonald v. U. P. Co., 35 Fed. Rep. 38.

⁴ Hargreaves v. Deacon, 25 Mich. 1; Beach Con. Neg., Sec. 50, p. 70 and cases cited. The visitor, or licensee, however, must be in the exer-

where the licensee is upon the premises under an arrangement which is for the mutual benefit of the owner and such licensee, or he can be said to be upon the premises, under an invitation, either express or implied, since it would be wrong to permit an owner to invite one upon his property when he knew that he was liable to be injured, as a result of such visit, the owner will be held liable, if latent defects or dangers are present, of which he is advised, if he fails to give warning thereof to such licensee.¹ Hence, if permission, express or implied, is given the public, or a particular individual, to use a path across one's land, and the owner knows of a dangerous excavation near such path into which one using such path, on a dark night, is apt to fall and be injured, the owner is liable, if he fails to guard such pit, or give notice thereof, to such licensee.² But the owner must be guilty of an actual wrongful act, toward such licensee, to render him liable for an injury to the latter, and if he is ignorant of the defect which causes the injury, he would not be liable, notwithstanding an injury to such licensee.³

case of ordinary care, when injured. *Idem.* *Caniff v. Blanchard Co.*, 66 Mich. 638; 33 N. W. Rep. 744. See, also, *Shirley's Lead. Cas.* 276; *Tolhausen v. Davies*, 57 L. J. Q. B. 392.

¹ *Carlton v. Franconia Iron Co.*, 99 Mass. 216; *Graves v. Thomas*, 96 Ind. 361; 48 Amer. St. Rep. 727; *Campbell v. Boyd*, 88 N. C. 129; 39 Amer. St. Rep. 503; *Shirley's Lead. Cas.* 278; *Ball's Lead. Cas.* 292; *Welch v. McAllister*, 15 Mo. App. 492.

² *Graves v. Thomas*, 96 Ind. 361; 48 Amer. St. Rep. 727.

³ *Eisenberg v. Mo. Pac. Co.*, 38 Mo. App. 85. "One who enters on the premises of another by invitation assumes the risks of all dangers attendant thereon of which he has knowledge." *Williams v. Belmont Coal & Coke Co.*, 46 S. E. Rep. 802. "Where a servant employed on excavating work is told to leave his dinner bucket in a boiler house maintained by the master, and while there eating his lunch is injured by an explosion of dynamite caps negligently left in the boiler house by the master, a contention, in an action for the injuries, that the servant was a mere licensee while in the house so as to preclude recovery, was without merit." Judgment (1901) 96 Ill. App. 815, affirmed. *Heldmaier v. Cobbs*, 62 N. E. Rep. 858; 195 Ill. 172.

§ 534. **Pleading injuries to.** — In pleading injuries to third persons from the negligent acts of the defendant's servants, or employees, since the liability of the defendant depends not upon the mere negligence of the employee, but the fact that, by legal construction, his act, in causing the resulting injury, is chargeable to another, all the facts from which such liability would result must be pleaded in the first instance, with strictness. Hence, it is necessary to show not only the relation of master and servant, between the defendant and the employee whose acts occasioned the injury, but it is likewise essential to show that the alleged negligent act, which caused the injury, was done, by the defendant's employee, in the general scope of his authority, or in the line of the duty of such employee, and if the complaint fails to show this fact it is insufficient to allege a cause of action.¹

§ 535. **Joint liability of master and servant.** — As all the wrong-doers are generally held liable for the consequences of their joint wrong, where the negligence of the servant could be legally said to include an element of personal negligence upon the part of the master, the injured party has his election as to which of such wrong-doers he will sue, or he can, if he so desires, sue all.² But to constitute a joint liability of a master and servant, for the negligent act of the servant, there must be actual negligence, as distinguished from imputed negligence, of the master, concurring with a negligent act of the servant.³ And a joint action cannot be maintained against a master

¹ *Raming v. Met. Ry. Co.*, 157 Mo. 477; 57 S. W. Rep. 268; *Farber v. Ry. Co.*, 116 Mo. 81; 22 S. W. Rep. 631; 20 L. R. A. 350; 32 Mo. App. 378.

² *Gardner v. Southern Ry. Co.*, 65 S. C. 341; 43 S. E. Rep. 816; *Schumpert v. Southern Ry. Co.*, 65 S. C. 332; 43 S. E. Rep. 813; *White Mines & Mining Remedies*, Sec. 404 and cases cited.

³ *Shaffer v. Union Brick Co.*, 128 Fed. Rep. 97.

and a servant, for an injury from the negligence of the servant alone, the causes of action against the two defendants being separate and distinct and based upon wholly different grounds.¹

§ 536. **Jury questions in actions for.** — Where the evidence is all one way, upon the issue as to the fact of a relation of master and servant, the competence or carelessness of the servant, and whether or not the alleged negligent act was within or without the scope of his authority, it is a question of law for the court;² but if the facts are disputed upon such issues and there is evidence on both sides of the controversy, then these issues are questions to properly submit to the jury to decide.³ The fact that the injured person is a trespasser, will not prevent the submission of the cause to the jury, if there is evidence that the injury could have been avoided, after his presence was discovered, but, in the absence of such evidence, it would be proper for the court to refuse to submit such issue to the jury, as this is the only condition under which a liability results to a trespasser, on the part of the employer of a negligent employee.⁴

¹ *Helms v. Northern Pac. Co.*, 120 Fed. Rep. 389; *Kelly v. C. & A. Co.*, 122 Fed. Rep. 286.

² Upon the question of whether or not the negligent employee was a servant or independent contractor, see *Gayle v. Missouri Foundry & Co.*, 177 Mo. 427; 76 S. W. Rep. 987. On question of servant's care or negligence, see *Calumet Electric & Co. v. Peters*, 88 Ill. App. 112; *Shaw v. Hallenbeck*, 55 S. W. Rep. 686. And on question of whether or not negligent act was within or without scope of servant's authority, see *Girvin v. N. Y. Cent. & Co.*, 65 N. Y. S. 299; 52 App. Div. 562.

³ *Gayle v. Missouri Foundry & Co.*, 177 Mo. 427; 76 S. W. Rep. 987.

⁴ *Highland & Co. v. Robinson* (Ala. 1900), 28 So. Rep. 28; *Girvin v. N. Y. Cent. & Co.*, *supra*.

CHAPTER XXVII.

ACTS OF INDEPENDENT CONTRACTORS.

- SECTION** 537. Who is an independent contractor.
538. Non-liability established by early English case.
539. How issue as to determined — Court and jury.
540. Joint undertaking, employer liable.
541. Employer's interference with work of.
542. Contractor for excavation of mine.
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547. Mining coal by ton — Supervision and control.
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§ 537. Who is an independent contractor. — “An independent contractor is one who undertakes to do a specific piece of work for another, without submitting himself to such other's control, in the details of the work, save as to the result of the work.” This is the definition of an independent contractor, recently given by the Supreme Court of Missouri,¹ which is believed to be an accurate definition. So within this definition, if one contracts to do a specific piece of work, furnishing his own assistants and executing the contract in the performance of the labor, either entirely according to his own ideas or in accordance with a plan previously given him by the person for whom the work is to be done, without being subject to the orders of the latter, in respect to the details of the work, he is a contractor and not a servant of the one so hiring him.²

¹ Gayle v. Missouri Foundry &c. Co., 177 Mo. 427; 76 S. W. Rep. 987. See, also, Shear. & Red. Neg., Sec. 164; 2 Thomp. Neg., Sec. 22, p. 899.

² Gayle v. Missouri Foundry &c. Co., *supra*. See, also, Fink v. Missouri Furnace Co., 82 Mo. 276; Morgen v. Bowman, 22 Mo. 538; Long (589)

§ 538. **Non-liability established by early English case.**—In a case decided over a half century ago, in England,¹ the rule which holds a master to a responsibility for the acts of his servant, done within the usual scope of his authority, was denied, as to the employer of a contractor or sub-contractor, where the relation of master and servant did not exist, and this rule is now firmly established in England. In the case referred to, a railway company entered into a contract with A, to construct a branch line

v. Moon, 107 Mo. 384; *Crenshaw v. Ullman*, 113 Mo. 639. An express contract to pay by the job, is usually held to be strong evidence that the relation of master and servant does not exist. *Gayle v. Missouri Foundry Co.*, 177 Mo. 427; 76 S. W. Rep. 987. The method of payment is a circumstance to be considered in determining the character of the relation. But that the work is to be done to the satisfaction of the employer will not render him liable for injuries from negligence of the contractor. *Indiana Iron Co. v. Gray*, 19 Ind. App. 565; 48 N. E. Rep. 803; *Wright v. Terry*, 28 Fla. 160; *Miller v. Minn. & N. W. Co.*, 76 Iowa. 655; *Brown v. Accrington Co.*, 3 Hurlst. &c. 511. The proper question to be solved, in determining the liability and who is responsible therefor, is, "Who had control of the execution of the work that was being performed?" *Char'ock v. Freel*, 125 N. Y. 857; 34 N. Y. S. R. 971; 26 N. E. Rep. 262. "An independent contractor is one who represents his employer's will only as to the result of his work, and not as to the means for its accomplishment." *Bibb v. Norfolk & West. Co.*, 87 Va. 711; 14 S. E. Rep. 163; *Long v. Moon*, 107 Mo. 384; 17 S. W. Rep. 810. One engaged to deliver coal, at an agreed price per load, is a servant, not an independent contractor. *Waters v. Fuel Co.*, 52 Minn. 474; 55 N. W. Rep. 52. But where a company hires teams and men from another to deliver its product, the owner of the teams and hirer of the men is liable for any negligence on their part. *Waldock v. Winfield*, 70 Law J. K. B. 925; 2 K. B. 596; 35 Law T. 202. The test for determining the character of the relation is not the method of payment, but whether the employee used his own means and methods for accomplishing the work. *Morgen v. Smith*, 159 Mass. 570; 85 N. E. Rep. 101. Whether the doctrine of *respondeat superior* applies between the employer and a subcontractor or not, depends upon the contract, with reference to the employer's right to direct the latter as to the time, place, and manner of performing the work. *Klages v. Gillett-Herzog Co.*, 86 Minn. 458; 90 N. W. Rep. 1116.

¹ *Knight v. Fox*, 1 E. L. & E. R. 477; 20 L. J. R. (N. S.) Exch. 65; 14 Jur. 968; November 5th, 1850.

of road for it; A contracted with B, to erect a tubular bridge, parcel of the works. B had a surveyor, C, whom he paid a salary of 150*l.* a year to attend to his general business; and after obtaining the contract for the bridge, B contracted with C, to provide the necessary scaffolding, for which he was to receive 40*l.*, irrespective of his salary, B, to furnish the requisite materials, including lights. One of the poles of the scaffold rested on the highway, and owing to the want of sufficient light, to warn the passers-by, D stumbled over the pole and was injured; subsequent to which additional lights were placed on the spot and B paid for them, but the court held that B was not liable and that D's remedy was against C.

§ 539. **How issue as to determined — Court and jury.**— Where the essential facts for determining the relation of the parties are undisputed or conceded, by the parties to the cause, the court may declare as a matter of law, whether

¹ *Knight v Fox, supra*, Parke, B, observed: "The act complained of was not at all done by Cockrane, in the character of a servant of the defendants." Alderson, B, said: "On the evidence it appears that Cockrane, when he did that negligent act, was acting as a sub-contractor and did it on his own account. The defendants were not concerned in the matter and the plaintiff's action should, therefore, have been brought against him." And Pollock, C. J., *en passant*, also said: "No doubt, taking the case as it stands, you may, by rejecting some of the evidence, and perverting the rest, make out enough to persuade a jury to find for the plaintiff, sooner than let her go uncompensated for the injury she received. But it is otherwise, when you examine all the evidence; and I may here remark, that *when compensation is to come from the pockets of others, people are extremely liberal in awarding it.*" See, also, *Quarnam v Barnett*, 6 M. & W. 499; *Allen v. Hayward*, 7 Q. B. 960; *Rapson v. Cubitt*, 9 M. & W. 710. The duty of an employer to provide a reasonably safe place or appliances, does not extend to one employed by his independent contractor. *Callan v. Pugh*, 66 N. Y. S. 1118; 54 App. Div. 545. A contractor is not responsible for the acts of a sub-contractor, unless there is some act of personal negligence on the part of the contractor, which caused the accident, independent of all other causes. *Nelson v. Young*, 87 N. Y. S. 69; 91 App. Div. 457.

one is an independent contractor or a servant of the employer.¹ But where the facts are disputed, or are not agreed to by the parties to the cause, the court should leave it to the jury, under proper instructions, to say whether the relation of master and servant or that of employer and contractor existed.²

§ 540. **Joint undertaking—Employer liable.** — Where the relation existing between the party in possession of the place or appliance when an injury occurs and the defendant, is not exactly that of master and servant, or employer and contractor, but is rather that of persons engaged in a joint undertaking, in which each expects to realize a profit, then the employer, or the one occupying the relation of superiority, is liable for any negligence of the other, through whose efforts he expects to realize a profit. This relation is illustrated by a recent case that came before the Supreme Court of Missouri,³ where the plaintiff's husband,

¹ *Gayle v. Missouri Foundry Co.*, 177 Mo. 427; 76 S. W. Rep. 987.

² *Gayle v. Missouri Foundry Co.*, *supra*. When there is any real question as to what the exact relation was, the issue should be submitted to the jury. *Sackner v. Waddell* (Md. 1904), 56 Atl. Rep. 899; *Cratt v. Albemarle Co.*, 132 N. C. 151; 43 S. E. Rep. 597; *Brennan v. Merchant & Co.*, 205 Pa. 258; 54 Atl. Rep. 891.

³ *Rice v. Smith*, 171 Mo. 331; 71 S. W. Rep. 128. The court bases this decision on the former decision of *Roddy v. Railroad*, 104 Mo. 285. In that case, plaintiff was an employee of a quarry owner, who owned a switch connecting with defendant's road. Defendant furnished a car with a defective brake, and plaintiff, using it on the switch of his employer, was injured. Defendant contended it owed plaintiff no duty, but the court said: "We think each of these contracting parties owed to the other, and his employees, the duty of properly discharging his part of the joint undertaking, in respect to any matter exclusively devolving upon him. Pickle had nothing to do with selecting or providing the cars. That duty was intrusted entirely to the defendant. They were intended for the use of Pickle and his servants, in discharging his part of the contract, and we think the obligation rested upon defendant to use ordinary care to provide such as would be reasonably safe for such use." The propriety

while working in the drift of a mine, was struck by a boulder, which fell from the roof of the drift and killed him. The defendants were licensees of the mine, and at the time of the defendant's death it was being operated by one Raynes, who, at his own expense, was to mine the ore, put it in the tub and attach the tub to the hoister, and the defendants were to see to the hoisting of it, prepare it for sale, sell it and divide the proceeds with Raynes. Raynes employed the deceased and paid him for his wages and the defendants had no control over him. The defendants contended that Raynes was a mere renter or independent contractor, and that they were not responsible for his negligence, but the court held that the contract between them extended to the condition of the mine, in which there was a community interest in both Raynes and the defendants, and that the duty devolved upon the defendants to see that the mine, whose usufruct they enjoyed, was in a reasonably safe condition for men to work in, and if they were neglectful of that duty and an injury resulted therefrom, they must respond in damages therefor.

of this decision may well be doubted, as the court had to create a duty, toward the injured employee of Pickle, to hold the railroad company liable, where none, in fact, existed, but this illustrates the truth of Lord Pollock's saying that people are extremely liberal in alleviating the misfortune of others, "when compensation is to come from the pockets of others." "Defendants, who were licensees of a mine, entered into an agreement with a third party, whereby the latter was to mine the ore, put it in the tub, and hook the tub to the hoisting rope and thereupon defendants were to hoist the ore, and divide the profits with the third party. The latter was to employ the miners to do the underground work. *Held*, that, the undertaking being for the mutual benefit of the defendants and the third party, it was defendants' duty to see that the mine was in a reasonably safe condition, and, where one of the miners employed by the third party was killed by reason of its unsafe condition, defendants were liable." *Rice v. Smith* (Mo. 1902,) 71 S. W. Rep. 128. Where employees of a coal mining company wrongfully leave a coal car on a track, where it is struck by a passing train and, as a result of the collision, a brakeman is injured, the coal

§ 541. Employer's interference with work of contractor. — Where the employer retains no right of supervision or interference with the work of the contractor, but the latter is left to pursue the same, in the manner which most commends itself to his wisdom or discretion, the employer is not liable for personal injuries, resulting from his lack of discretion or skill, in the performance of his contract, but the contractor alone would be responsible, in such case, for resulting injuries to third parties.¹ But for any injury to a third person, or to an employee of a contractor, where the employer of such contractor has reserved and exercised a personal supervision or control of the method of work, or means of accomplishing the end sought to be achieved, which can be traced to the negligent act of the employer, the latter, and not the contractor, will be responsible.²

§ 542. Contractor for excavation of mine. — It is a customary occurrence in mining sections for a landowner to let a contract to sink a shaft, a certain depth, to an independent contractor, to be paid so much per foot, through earth and rock, until the required depth is attained. Where such a contract is let, if the contractor furnishes all the appliances and the owner retains no supervision of the work, the contractor alone is liable for an injury to his employees and third parties, during the course of his work.³ Where,

company is liable for the injury, caused by the neglect of its employees. *Hess v. Berwind-White Coal Mining Co.*, 178 Penn. 239; 35 Atl. Rep. 990.

¹ *Wilbur v. White*, 98 Me. 191; 56 Atl. Rep. 657.

² So held, in Pennsylvania, as to an injury from a boiler explosion, where the repairs, under the supervision of the employer, were by an independent contractor. *McNeill v. Crucible Steel Co.*, 207 Pa. 493; 56 Atl. Rep. 1067.

³ *Central Coal & Iron Co. v. Bailey*, 76 S. W. Rep. 842; *Same v. Grider*, 74 S. W. Rep. 1058; *Lendberg v. Brotherton Iron Mining Co.*, 42 N. W. Rep. 675.

however, he reserves any supervision of the work, or furnishes the appliances, he will be liable for any injury, resulting from a defect in the appliances furnished, or for any negligence in the supervision of the work.¹ In a Michigan case, a mining company let a contract for the sinking of a shaft, to contractors, who had sole charge of the work, and it was held the employer was not liable for an injury to one of the contractor's employees, from the breaking of a rope, used in the shaft;² a similar rule was laid down in Kentucky,³ and in a Pennsylvania case, the owner was held not liable for an injury from an explosion of gas pipes, while they were being installed, before acceptance of the work, by the owner, as the contractor alone was responsible for negligent acts of its employees or for the defective condition of appliances used by it.⁴

§ 543. **Appliances furnished by employer.** — “The relation of master and servant does not cease, so long as the master reserves any control, or right of control, over the method and manner of doing the work, or the agencies by which it is effected,”⁵ and hence, it is held, in Missouri, that if the mine owner employs one, by special contract, to sink a shaft and reserves to himself the kind of machinery and appliances he will furnish the contractor to work with, in making the excavations and sinking such shaft, that he will be liable to an employee of such contractor, for personal injuries received in the course of his work, due to an unsafe condition of the appliances fur-

¹ *Fell v. Rich Hill Coal Mining Co.*, 23 Mo. App. 216.

² *Lendberg v. Brotherton Iron Mining Co.*, 42 N. W. Rep. 675.

³ *Central Coal & Iron Co. v. Bailey*, 76 S. W. Rep. 842; *Central Coal & Iron Co. v. Grider*, 74 S. W. Rep. 1058.

⁴ *Chartlers Valley Gas Co. v. Waters*, 28 W. N. C. 175; 16 Atl. Rep. 423; 123 Pa. 220.

⁵ *Thompson on Negligence*, Sec. 29, p. 907; *Speed v. Railway Co.*, 71 Mo. 308. But see *Roddy v. Ry. Co.*, 104 Mo. 225.

nished.¹ But if the employer, under the contract, agrees to only furnish the appliances and does not agree to keep the same in repair, but the contractor himself undertakes to do this, the employer will not be liable for an injury to a servant of the contractor for a defect due to a want of repair, for this would be a personal act of neglect on the part of the contractor and not the employer. Accordingly, in Kentucky, where the employer engaged a contractor to sink a shaft and furnished him a new rope, he was held not liable for injuries to the contractor's servant, due to defects in rope, caused by wear, it not being his duty to see that the rope remained or continued in a safe condition.²

¹ *Fell v. Rich Hill Coal & Mining Co.*, 28 Mo. App. 216, per Phillipps, P. J., citing *Detroit v. Corey*, 9 Mich. 165; *Sadler v. Hellock*, 4 El. & Bl. 570; *Heffernon v. Benkard*, 1 Robt. 436; *Griffiths v. Wolfram*, 22 Minn. 185. "A company employed a contractor to sink a shaft on its property under a contract requiring it to 'furnish all necessary tools * * * for doing this work, and also a whim or hoist;' 'all labor to be furnished by the contractor.' Pursuant to the contract, the company furnished a whim or hoist, and, as a part thereof, the necessary rope. All the employees were engaged and paid by the contractor, and the company did not engage or control them in the performance of their duties. *Held*, that the relation of master and servant did not exist between the company and the employees, and it therefore owed them no duty to keep the rope in safe condition, and was not liable for the death of one of them, caused by its having become defective." *Central Coal & Iron Co. v. Grider's Adm'r* (Ky. 1903), 74 S. W. Rep. 1058; 25 Ky. Law. Rep. 163. "Where one furnishes a safe rope to independent contractors to use in work for him in a shaft, he is not liable for injuries to their servants resulting from defects in the rope caused by wear; it not being his duty to see that the rope continues in a safe condition." *Central Coal & Iron Co. v. Bailey's Adm'r* 76 S. W. Rep. 842; 25 Ky. Law. Rep. 973.

² *Central Coal & Iron Co. v. Bailey*, 25 Ky. L. R. 973; 76 S. W. Rep. 842; *King v. R. R. Co.*, 66 N. Y. 181; 23 Am. St. Rep. 87. See, also, *Central Coal & Iron Co. v. Grider*, 25 Ky. L. R. 165; 74 S. W. Rep. 1058. Although defendant had furnished a defective derrick to his contractor, he was held not liable, unless he did so maliciously or willfully, or it was inherently dangerous, in *Southern Oil Co. v. Church* (Tex. Civ. App. 1903), 74 S. W. Rep. 797; 75 S. W. Rep. 817. An owner who furnishes a hoister to an independent contractor is not liable for any injury to one

§ 544. **Contractor's failure to guard excavation.**— The non-liability, on the part of the owner, where there is an absence of evidence of a reservation of control or method in the performance of the work, was recently illustrated by a well-considered Georgia case,¹ where a property owner who, for years, had suffered the public to use a thoroughfare over the same, employed an independent contractor to make certain excavations thereon, and the latter made the excavations, and in the course of the performance of his undertaking, failed to erect or maintain any guard or railing around the pit, as a result of which one of the licensees of such property, so using the pathway across the land, fell into the pit and was injured. It was held that the owner of the property was not liable for such injury, as he had reserved no supervision or control of the work, but the whole was left to the direction and judgment of the contractor.

§ 545. **Statutory control of contractor.**— While the doctrine is quite generally recognized that the rule of *respondet superior* applies where the person sought to be

of his employees, due to the improper management of the appliance. *Plette v. Bavarian Co.* (Mich.), 52 N. W. R. p. 152. The right to inspect the work, when done, or during progress of completion, will not render the employer liable for the negligent acts of his independent contractor. *Gayle v. Missouri Car & Foundry Co.*, 177 Mo. 427; 76 S. W. Rep. 987. Where the owner reserves the right to furnish plans for the work and furnishes negligently constructed plans, he is liable for an injury to an employee of a contractor, the same as if he had been personally conducting the work. *Brannock v. Elmore* (Mo.), 21 S. W. Rep. 451. Where there is a duty to furnish safe tools or appliances to a contractor, on the part of the employer, he is responsible for an injury from defective or dangerous tools, which he furnished. *Omaha B. & T. Co. v. Hargadine* (Neb. 1904), 98 N. W. R. p. 1071. Where an injury results from a defective appliance used to lift dirt, owing to negligence of the contractor, if the owner was under no obligation to furnish such appliance, he is not liable. *Bush v. Grant*, 22 Ky. Law Rep. 1766; 61 S. W. Rep. 868.

¹ *Ridgeway v. Downing Co.*, 34 S. E. Rep. 1028.

charged has the right to control the action of the persons committing the injury,¹ this is only true, where the right of control is established by the contract relation of the parties and does not obtain, as to a statutory right of control, recognized on the part of the owner, or others, to whom a lawful right or control is recognized, as a quasi delegation of the State's right to police the employment, in order to prevent injury, for this is a legal control, given for the benefit of the general public and not to create a legal duty toward any individual, for the purpose of establishing a contract relation, for a breach of which a right of action would result. Accordingly, the control given to a mine owner, by the English Coal Mines Regulation Act,² and the rules thereunder, over persons working in the mines, for the purpose of preventing injuries to them, in the conduct of the mining operations, does not make the "sinkers" employed by an independent contractor to sink a shaft in a coal mine, "workmen" within the meaning of the Employer's Liability Act,³ so as to render the owner liable for a personal injury to such "sinkers."⁴

§ 546. When danger to public imminent. — On account of the interest of the general public, when the business of the contractor is such as is likely to result in injury to any considerable number of people, as where dangerous substances are handled near crowded thoroughfares, the owner is not permitted, in some of the cases, to exempt himself from liability for injuries resulting, by employing an independent contractor, but will remain liable for such

¹ *Pioneer Fireproof Con. Co. v. Hansen*, 176 Ill. 100; 69 Ill. App. 659; 52 N. E. Rep. 17.

² Eng. Coal Mines, Reg. Act, 1887, Sec. 51.

³ Eng. Emp. Liab. Act, 1880.

⁴ *Marrow v. Fllmby & B. M. Coal & F. B. Co.*, 2 Q. B. 588; 67 L. J. Q. B. (N. S.) 976.

injury, if he permits such dangerous work to be proceeded with in a manner likely to produce injury, the same as though he were himself doing the work. This is true, because, from the general nature of the surroundings, the owner would be held to a legal duty, toward the public, which he could not delegate to another,¹ the same as he would incur, in the repair or construction of dangerous places, toward tenants, or others, having a right to expect a reasonably safe place,² and, in all such cases, the owner could not avoid liability by the fact that he had employed another to do the work, by the contract. However, this rule is not always followed by the courts, and in a Maryland case, although the owner had reason to believe that a crowd of people would assemble on his land, he was held not negligent or liable, for an injury from an act of his contractor, but it was not in the prosecution of a business that was, in and of itself, likely to produce injury.³

¹ *Penny v. Wimbledon Urban Council*, 2 Q. B. 212; 67 L. J. Q. B. (N. S.) 754; 78 Law T. Rep. 748.

² *Wilber v. Follansbee*, 97 W. 577; 72 N. W. Rep. 559.

³ *Smith v. Benick*, 87 Md. 610; 42 L. R. A. 277; 41 Atl. Rep. 59. But see, *Clowdis v. Fresno Flume & I. Co.* (118 Cal. 315; 50 Pac. Rep. 373), holding that, "a master cannot delegate a duty from himself to the public, so as to relieve himself from liability for its improper performance." See, also, as to liability, where the work contracted for itself creates the danger, *Downey v. Low*, 22 App. Div. 460; 48 N. Y. S. 207. Where the nature of the work contracted to be performed is, in itself, dangerous, the owner is liable. *Williams v. Fresno Canal & Irr. Co.*, 96 Cal. 14; 31 Amer. St. Rep. 172; 20 Wash. Law. Rep. 614; 80 Pac. Rep. 961. Whenever an injury might be anticipated as a result of the direct process of the work, unless reasonable care is used, the master is liable. *Wertheimer v. Saunders*, 95 Wis. 573; 37 L. R. A. 146; 70 N. W. Rep. 824; *Chicago Fuel Gas Co. v. Meyers*, 168 Ill. 189; 64 Ill. App. 270; 48 N. E. Rep. 66. Where the act contracted to be done is itself a wrong, the owner is liable in case of a resulting injury therefrom. *Crisler v. Ott* (Miss.), 16 So. Rep. 416. For case where owner of property was held liable for injury from act of independent contractor, from blasting, see *Wetherbee v. Partridge*, 175 Mass. 185; 55 N. E. Rep. 894. The employer of a blasting company to do so much blasting is liable for its

§ 547. **Mining coal by the ton — Supervision and control.** — As already noted, the test for determining the liability of the owner is his retention of supervision, control or government of the details and methods of the work, or his lack of control of the means or methods, the relation of master and servant obtaining in cases where control is retained and that of owner and contractor, in the latter case.¹ In an Alabama case, the father of minor children entered into a contract, whereby his children were to cut coal for the employer, at an agreed price per ton, the father to furnish the tools, powder and other materials, but the “bank boss,” of the employer, to have control and supervision of the work. In an action for personal injuries to one of such children, the court held that the retention of the supervision of the work, made the employer liable.² But in a Virginia case, where one was employed to do the wood work on dry kilns, under a contract providing that the owner shall furnish the materials and that the contractor shall employ the labor and superintend the work himself, and receive a per diem for himself and each of his employees, he was held to be an independent contractor, for whose negligence the owner was not liable.³

§ 548. **Employee unloading coal by the car.** — A laborer, employed to unload coal, by the car, with a shovel, owned by himself, who sleeps in the coal yard and is on the

negligent acts, if it reserves the right to determine the place and method of such blasting and removes the material thrown down by the blast. *Louisville & N. Co. v. Tow*, 28 Ky. Law Rep. 402; 63 S. W. Rep. 27. The owner was held not liable for injuries from blasting, done by contractor, in *Berg v. Parsons*, 136 N. Y. 109; 50 N. E. Rep. 937; 41 L. R. A. 891; *French v. Vix*, 143 N. Y. 90; *Roemer v. Striker*, 143 N. Y. 134, *Gourdier v. Cormack*, 2 E. D. Sm. 254.

¹ *Gayle v. Missouri Car & Foundry Co.*, 177 Mo. 427; 76 S. W. Rep. 987; *Fink v. Mo. Furnace Co.*, 82 Mo. 276.

² *Drennan v. Smith*, 115 Ala. 396; 22 So. Rep. 442.

³ *Emmerson v. Fay*, 94 Va. 60; 2 Va. Law. Reg. 824; 36 S. E. Rep. 386.

look out for the job, and who is often employed by the same employer to unload cars of coal, for which he is paid by the day, while he is paid for each car load of coal unloaded, the employer retaining the right to direct and govern him, in all matters relating to the work, is held, in Louisiana, not to be an independent contractor, but an employee, for whose negligence while engaged in unloading the coal car, the employer would be liable.¹

¹ *Holmes v. Tennessee Coal, Iron, &c., Co.*, 49 La Ann. 1465; 22 So. Rep. 408. See, also, *Waters v. Pioneer Fuel Co. (Minn)*, 55 N. W. Rep. 52.

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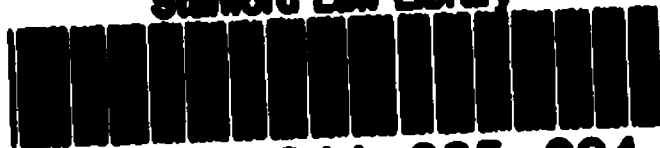
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